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No. 89-1416-CFX  
Status: GRANTED

Title: Air Courier Conference of America, Petitioner  
v.  
American Postal Workers Union, AFL-CIO, et al.

Docketed:  
March 8, 1990

Court: United States Court of Appeals for  
the District of Columbia Circuit

Counsel for petitioner: Farkas, L. Peter

Counsel for respondent: Solicitor General, Hajjar, Anton G.,  
Secular, Keith E.

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Entry	Date	Note	Proceedings and Orders
1	Mar 8 1990	G	Petition for writ of certiorari filed.
3	Mar 22 1990		Order extending time to file response to petition until April 30, 1990.
4	Apr 2 1990		Order further extending time to file response to petition until May 9, 1990.
5	Apr 2 1990		The above extension is for all respondents.
6	May 9 1990		Brief of respondents American Postal Workers Union, AFL-CIO, et al. in opposition filed.
7	May 9 1990		Brief of respondent United States Postal Service in opposition filed.
8	May 15 1990		DISTRIBUTED. May 31, 1990
9	May 23 1990	X	Reply brief of petitioner Air Courier Conference of America filed.
10	Jun 4 1990		Petition GRANTED. *****
12	Jul 9 1990		Order extending time to file brief of petitioner on the merits until July 27, 1990.
13	Jul 13 1990	D	Motion of respondents American Postal Workers Union, AFL-CIO, et al. to dismiss the writ for lack of jurisdiction filed.
14	Jul 27 1990		Joint appendix filed.
15	Jul 27 1990		Brief of petitioner Air Courier Conference of America filed.
16	Jul 27 1990		Brief of respondent United States Postal Service in support of petitioner filed.
18	Aug 6 1990		Order extending time to file brief of respondent on the merits until September 6, 1990.
23	Aug 13 1990	G	Motion of the Acting Solicitor General for divided argument filed.
22	Aug 15 1990		DISTRIBUTED. Sept. 24, 1990. (Motion of respondents to dismiss the writ for lack of jurisdiction).
20	Aug 16 1990		Opposition of United States to motion of respondents American Postal Workers Union, et al. filed.
21	Aug 17 1990		Opposition of petitioner Air Courier Conference of America to motion of respondents American Postal Workers Union, et al. filed.
24	Sep 6 1990		Brief of respondents United States Postal Service, et al. filed.
30	Sep 18 1990		Reply of respondents American Postal Workers Union, AFL-

Entry	Date	Note	Proceedings and Orders
25	Sep 19 1990		CIO, et al. to response filed by petitioners.
27	Sep 19 1990		CIRCULATED.
			Record filed.
		*	Certified copy of original record and proceedings received.
28	Oct 1 1990		Motion of respondents American Postal Workers Union, AFL-CIO, et al. to dismiss the writ for lack of jurisdiction DENIED.
29	Oct 1 1990		Motion of the Acting Solicitor General for divided argument GRANTED.
31	Oct 9 1990	X	Reply brief of petitioner Air Courier Conference of America filed.
32	Oct 9 1990	X	Reply brief of respondent United States Postal Service filed.
33	Oct 19 1990		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 28, 1990. (2ND CASE)
34	Nov 28 1990		ARGUED.

89- 1416

Supreme Court, U.S.  
FILED

MAR 8 1990

JOSEPH F. SPANIOL, JR.  
CLERK

No. 89-

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IN THE  
**Supreme Court Of The United States**

October Term, 1989

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**AIR COURIER CONFERENCE OF AMERICA,**  
*Petitioner,*

v.

**AMERICAN POSTAL WORKERS UNION,**  
**AFL-CIO, et al.,**  
*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

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March 8, 1990

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**QUESTIONS PRESENTED**

1. Are postal employees within the "zone of interest" of the statutes that establish and allow the United States Postal Service to suspend the postal monopoly when "the public interest requires?"

2. Did the court of appeals err in rejecting the Postal Service's interpretation of the "public interest" standard for suspending its monopoly by requiring the Postal Service to make specific determinations of potential revenue losses and their effects on the costs and service to all postal patrons in addition to finding benefits to the general public, competition and users of remail services?

## LIST OF PARTIES

In addition to the parties named in the caption, the parties below included the United States Postal Service and the National Association of Letter Carriers, AFL-CIO. The Air Courier Conference of America is a trade association with approximately 150 members.

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IN THE  
**Supreme Court Of The United States**

OCTOBER TERM, 1989

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AIR COURIER CONFERENCE OF AMERICA,  
*Petitioner,*

v.

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, et al.,  
*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

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The Air Courier Conference of America (ACCA), intervenor below, petitions the Court to grant a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit which vacated summary judgment dismissing a suit by the American Postal Workers Union, AFL-CIO and the National Association of Letter Carriers, AFL-CIO (referred to jointly as "Unions"), against the United States Postal Service (Postal Service).

### OPINIONS BELOW

1. Restrictions on Private Carriage of Letters; Suspension of the Private Express Statutes; International Remailing, Final Rule, United States Postal Service, 51 Fed. Reg. 29,636 (August 20, 1986), see Appendix (App.) 19a to 26a.

2. American Postal Workers Union, AFL-CIO v. United States Postal Service, Civil Action No. 87-3199 (D.D.C.), Order granting Air Courier Conference of America's motion to intervene (February 26, 1988), see App. 27a.

3. American Postal Workers Union, AFL-CIO v. United States Postal Service, 701 F.Supp. 880 (D.D.C. 1988), see App. 28a to 38a.

4. American Postal Workers Union, AFL-CIO v. United States Postal Service, 891 F.2d 304 (D.C. Cir. December 8, 1989), see App. 1a to 18a.

### JURISDICTION

The order of the court of appeals was entered on December 8, 1989. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Air Courier Conference of America (ACCA) was a party below. See district court order granting ACCA's motion to intervene (February 26, 1988), App. 27a; ACCA's Entry of Appearance in the court of appeals (February 6, 1990). ACCA is bound by the court of appeals' decision. *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007 (D.C. Cir. 1985).

This Court "recognize[s] that intervenors in lower federal courts may seek review in this Court on their own, so long as they have 'a sufficient stake in the outcome of the controversy' to satisfy the constitutional requirement of genuine adversity." *Maine v. Taylor*, 477 U.S. 131, 136 (1986); citing *Bryant v. Yellen*, 447 U.S. 352, 368 (1980); *Diamond v. Charles*, 476 U.S.

54, 68 (1986); see *City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 83-84 (1958).

ACCA members engage in remail pursuant to the Postal Service regulation at issue, 39 C.F.R. § 320.8. ACCA has standing pursuant to *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *International Union, UAW v. Brock*, 477 U.S. 274, 288-290 (1986).

### RELEVANT STATUTES AND REGULATIONS

The Private Express Statutes (PES), 18 U.S.C. §§1693-1699, 1729 (1982); 39 U.S.C. §§601-606 (1982); provide in pertinent part as follows:

18 U.S.C. §1696. Private express for letters and packets

(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town or place to any other city, town or place, between which mail is regularly carried, shall be fined not more than \$500 or imprisoned not more than six months, or both.

39 U.S.C. §601. Letters carried out of the mail

(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

The Postal Service's International Remail Rule, 39 C.F.R. §320.8 (Aug. 20, 1986), provides in pertinent part:

§320.8 Suspension for international remailing.

(a) The operation of 39 U.S.C. §601(a)(1) through (6) and §310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit

the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

## STATEMENT OF THE CASE

### 1. Administrative Proceedings

After years of threatening private air couriers with action under the Private Express Statutes, 18 U.S.C. §§1693-1699, 1729 (1982), 39 U.S.C. §§601-606 (1982) (PES), that embody the postal monopoly, the Postal Service in 1979 preempted impending Congressional action<sup>1</sup> to legitimize the air courier industry by suspending the postal monopoly for "extremely urgent letters." 39 C.F.R. §320.6, 44 Fed. Reg. 61,181 (October 24, 1979). In the years following adoption of the urgent letter rule, air couriers and others began offering a service that came to be known as international remail. Remail involves the express shipment of multiple letters or printed papers to a foreign post office for delivery in that country or third countries.

Purporting to "clarify" the 1979 urgent letter rule, the Postal Service in 1985 proposed a rule banning international remail. 50 Fed. Reg. 41,462 (October 10, 1985). That proposal drew nearly universal opposition from the highest levels of the Reagan Administration, Congress, the remail industry, and mailers. The grounds for opposition included: (1) questions as

<sup>1</sup> See Senate Comm. on Governmental Affairs, Postal Service Amendments Act of 1978, S. Rep. No. 95-1191, 95th Cong., 2d Sess., at 17-21 (September 13, 1978) (reporting favorably an amendment to exempt urgent letters from the postal monopoly); Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service, Hearings on the Private Express Statutes, 98th Cong., 1st Sess., (13 November 1979) (House committee members expressing frustration with resistance to an exemption for urgent letters from the Postmaster General).

to whether the domestic postal monopoly extended to international mail (Justice Department); economic and competition policy (Office of Management and Budget, Justice Department, Department of Commerce); the public interest (Justice Department); and international competitiveness of American firms doing business abroad (users, Justice Department).

Responding to this opposition, the Postal Service in March 1986 withdrew the proposed anti-remail rule and announced its intention to propose an alternative pro-remail rule. 51 Fed. Reg. 9652 (March 21, 1986). The withdrawal announcement included a statement by John R. McKean, Chairman of the Postal Service Board of Governors which emphasized that:

Congress entrusted us with this monopoly not for our own benefit but in order to let us better serve the American people. The critical question raised by this rulemaking is whether enforcement of the monopoly in this context would advance or retard consumer welfare and the interests of this nation.

It is the sense of the Board that private sector competition with the Postal Service in the provision of international remail services can - and already does - produce significant benefits to the public. Ultimately even the Postal Service itself can benefit from this kind of competition.

\* \* \*

The Board of Governors does not believe that any attempt to suppress this kind of competition would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people.

51 Fed. Reg. at 9853.

On June 17, 1986 the Postal Service proposed a new rule suspending the PES "to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States." 51 Fed. Reg. 21,929 (June 17, 1986). The Department of Justice "strongly endorsed" the proposed regulation as "based on an ample factual record that demonstrates that competition in international remail is in the public interest."<sup>2</sup>

The only opposition to the new remail rule came from the postal employees' Unions. However, apart from allegations that "APWU and NALC members are directly affected in their employment opportunities, and as members of the public and users of the mails," the Unions confined their comments to legal arguments regarding the PES, the public interest requirement in the suspension provision and the quality of the administrative record. Rather than offer evidence of harm to the public interest, the Unions sought delay for further study by the Postal Service.<sup>3</sup>

The remail rule issued on August 20, 1986 substantially as proposed. 51 Fed. Reg. 29,636.

## 2. Decisions Below

On November 25, 1987 the Unions filed suit in district court for declaratory and injunctive relief against enforcement of the international remail rule on grounds that the Postal Service had acted arbitrarily and capriciously in adopting it. The district courts have original jurisdiction over suits against the Postal Service under 39 U.S.C. §409 (1982).

<sup>2</sup> Comments of the United States Department of Justice at 3, 6 (July 17, 1986).

<sup>3</sup> The record before the Postal Service included a detailed, and unrebutted, analysis by the International Remail Committee that suggested the net loss of postal revenue from international remail was insignificant, amounting to no more than \$3 million per year in 1985. Comments of International Remail Committee, pp. 38-45 (December 12, 1985).

On December 20, 1988 the district court granted the Postal Service's motion for summary judgment in which intervenor ACCA had joined, App. 28a. Judge Richey held that, while the Unions had Article III standing, they nonetheless lacked standing to sue because they were not within the "zone of interest" of the PES. On the merits, the district court held that even if the Unions had standing, (1) the Postal Service had not exceeded its suspension authority under the Union's "heightened interpretation" of the 39 U.S.C. §601(b) "public interest requires" standard and (2) the remail rule was not arbitrary, capricious nor an abuse of discretion because the Service had "identified the factors supporting its decision, drawn rational inferences where detailed facts did not exist, and drawn a rational connection between the facts and the decision made." App. 37a. The Unions appealed.

On December 8, 1989, the court of appeals vacated summary judgment for the Postal Service. The District of Columbia Circuit held that the zone of interest of the PES, though dating back to 1792, had to be viewed in the context of the entire statutory framework of the 1970 Postal Reorganization Act (PRA). 39 U.S.C. 101 *et seq.*, Pub. L. 91-375 (August 12, 1970). The court then found that "a key impetus for the PRA appears to have been a nationwide work stoppage by postal employees which occurred in March 1970" and "[t]herefore a principal purpose of the PRA was to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees." App. 8a. This "interplay" between the PES and PRA persuaded the court "that there is an 'arguable' or 'plausible' relationship" between the PES's goal of universal postal service and the employment interests of the Unions. App. 8a-9a.

Alternatively, the court held that even without the interplay between the PES and PRA, the Unions would be in the zone of interest of the PES because "the revenue protective purposes of

the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities." *Id.* Therefore, the court concluded, the Unions have standing because their "interests are largely congruent with the purposes of the PES." App. 10a.

The court of appeals then found that the Postal Service applied too narrow an interpretation of the §601(b) public interest test by considering only the benefits of the international remail rule and only to the segment of the Postal Service's consumer base that engaged in international commerce. The court held that the Postal Service's "interpretation of the 'public interest' is not reasonable because it did not give sufficient attention to how revenue losses might affect cost and service of other postal patrons." App. 14a.

### REASONS FOR GRANTING THE WRIT

This petition should be granted: (1) to resolve a specific conflict among the circuits as to the standing of postal employees' unions under the PES; (2) to clarify the controversy and confusion surrounding the "zone of interest" test that the decision below will exacerbate and that the concurring and lower court opinions of four current members of the Court have suggested should be clarified; and (3) because the interpretation of the public interest standard of the suspension provision of the PES presents an important issue of administrative law and procedure.

#### I.

### CONFLICT AMONG CIRCUITS

There is conflict among the circuits on the issue of whether the Unions are within the zone of interest of the PES. The District of Columbia Circuit below and the Tenth Circuit have held yes, *National Association of Letter Carriers, AFL-CIO v.*

*Independent Postal System of America, Inc.*, 470 F.2d 265 (10th Cir. 1972); *American Postal Workers Union v. React Postal Services, Inc.*, 771 F.2d 1375 (10th Cir. 1985); the Sixth Circuit rejects that conclusion:

It cannot be seriously contended that the Private Express Statutes was enacted for the protection of a class which included the postal employees or a union representing them.

*American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal System of America, Inc.*, 481 F.2d 90, 93 (6th Cir. 1973), *cert. dismissed*, 415 U.S. 901 (1974).

The Union's standing under the PES is an important question of federal law because the interests of the Unions are increasingly at odds with those of the Postal Service, postal patrons, private express couriers and thoughtful public policy and because the Unions will always be able to challenge such Postal Service suspensions in the District of Columbia Circuit.

Before the Postal Service proposed its 1985 anti-remail rule it had sought Justice Department action against remailers.<sup>4</sup> The Justice Department declined to prosecute. Interpretation of the PES as protecting employment opportunities can only lead to additional litigation between the Unions and legitimate private competition that either has Postal Service approval or is believed by government enforcement officials not to violate the postal monopoly laws. Allowing the Unions to litigate where the government abstains, based on sound legal and competition policy considerations, will only serve to make lawful private competition with the Postal Service more expensive and disserve the interests of consumers.

<sup>4</sup> Statement of Walter Duka, Assistant Postmaster General, Int'l Postal Affairs., to Postal Service Board of Governors, Tr. 49-50 (September 6, 1985).

## II.

## CLARIFY "ZONE OF INTEREST TEST"

There are two requirements for standing to challenge agency rulings: (1) the "injury in fact" test requires plaintiffs to show that they will be injured by the agency action in order to assure the courts that a real justiciable controversy exists under Article III of the Constitution, and (2) the zone of interest test, a "prudential" limitation, requires plaintiffs to show that they are among the class protected by the statute under which they sued to insure that Congress intended them to be "private attorneys general" to challenge agency action.<sup>5</sup> Not everyone injured has a right to complain. The zone of interest test has generated substantial confusion and controversy.<sup>6</sup>

Some courts have limited the zone of interest to that defined on the face of the statutory provision under which suit was brought.<sup>7</sup> This Court has permitted reference to expressions of Congressional intent contained elsewhere. In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970) it looked to the legislative history of a later statute. In *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388 (1987), the Court looked to the legislative history of an earlier statute. In both *Data Processing* and *Clarke*, the Court looked to related statutes that clarified the Congressional intent to limit competition and held that competitors were within the zone of interest to challenge agency actions that the plaintiffs contended would permit unlawful competition with them. *Clarke*, 479 U.S. at 403. In spite of *Clarke*'s narrow holding, the Court engaged in what three of the eight participating Justices referred

<sup>5</sup> See *Community Nutrition Institute v. Block*, 698 F.2d 1239, 1256 (D.C. Cir. 1983) (Scalia, J. concurring in part and dissenting in part), *reversed* 467 U.S. 340 (1984).

<sup>6</sup> *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388, 396 fn 11 (1987).

<sup>7</sup> See e.g., *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 140 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086, (1978).

to in a concurring opinion as a "sweeping discussion" of the zone of interest test.

The court of appeals' reliance upon the "sweeping discussion" of the zone of interest test in *Clarke* raises three important issues concerning the application of the test that urge review and clarification by this Court: (1) when may the courts look beyond the statute under which plaintiff brings suit to determine whether Congress "arguably"<sup>8</sup> intended that "a particular plaintiff should be heard to complain of a particular agency decision," 479 U.S. at 399; (2) what limits are there to the consideration of other statutes and other factors that the courts can look to for "all indicators helpful in discerning that intent," *id.* at 400; and (3) how remote may the plaintiff be from those directly affected and yet permit an inference that Congress intended such plaintiff to be within the zone of interest.

First, there was no need here for the court of appeals to look beyond the PES to discern its zone of interest. The district court quite properly noted "the 'interest' created by the PES is in maintaining sufficient revenue, by means of a monopoly, to permit the Service to serve the totality of the mail delivery market in the United States." App. 32a, fn 2. The court of appeals did not disagree. The D. C. Circuit articulated no need, let alone one based on legitimate concerns about ambiguity or change in statutory purpose, to look beyond the PES. The 1970 PRA revised Title 39 of the U.S. Code, but did not reenact, or otherwise disturb the basic prohibitions against private carriage

<sup>8</sup> There is some question whether "arguably" remains part of the test. In his concurrence and dissent in *Community Nutrition*, Justice Scalia noted that in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982), then the Supreme Court's most recent recitation in a non-APA case, the Court omits the word "arguably" from the zone of interest formula. 698 F.2d at 1256. The *Clarke* majority relegates "arguably" to quotes of earlier formulations of the test and doubts the possibility of formulating a single inquiry. 479 U.S. at 400 fn. 16.

of letters, which have been located in Title 18 since 1909. See H. R. Rep. No. 91-1104 at 44 (May 19, 1970).

Second, even if there were reason to look beyond the PES, there are limits to what the lower courts may look to for indications of Congressional intent. While *Clarke* states that "all indicators helpful in discerning that intent must be weighed," 479 U.S. at 400, it refers elsewhere to "a relevant statute," *id.* at 396, and does not relax the requirement that such "relevant" statute have "an identity of purpose"<sup>9</sup> or "a single unified purpose."<sup>10</sup> See *Data Processing*, 397 U.S. at 155. The sweeping language in *Clarke* confused the court of appeals below into ignoring the limitations on the indicators it could consider to discern the zone of interest of the PES. The court erred in looking to the PRA, looking beyond the PRA to the "impetus" for it, and concluding that the undefined "interplay" between the PRA and the PES brought the Unions within the protected zone of the PES.

The labor reforms of the PRA, upon which the court relied for finding an "interplay" between the statutes, were enacted nearly two hundred years after the original postal monopoly provision that underlies the PES and for vastly different reasons.<sup>11</sup> As the district court noted, the PES were intended to

<sup>9</sup> *Community Nutrition Institute v. Block*, 698 F.2d 1239, 1250 (1983), reversed on other grounds, 467 U.S. 340 (1984).

<sup>10</sup> *Tax Analysts*, *supra.*, 566 F.2d at 141.

<sup>11</sup> A postal monopoly law was first enacted by the Continental Congress in 1782. See G. L. Priest, *The History of the Postal Monopoly in the United States*, 13 *J. Law and Economics* 33, 48 (1974). The current version of the postal monopoly law was first enacted in Act of June 8, 1872, ch. 335, 17 Stat. 283. No legislative material has been found to explain the particular monopoly language adopted. Since 1872, the prohibition against the private carriage of letters (18 U.S.C. §1896) has been reenacted twice, as part of general codifications of the Criminal Code. The first occasion was the Criminal Code of 1909, ch. 321, §§181, 183, 186, 35 Stat. 1124-25, in which

(footnote continued)

maintain sufficient postal revenues to allow nationwide service at uniform rates. The PRA's labor reforms, on the other hand, were enacted to increase productivity by eliminating the political patronage system that stifled the advancement and morale of postal employees.<sup>12</sup> Lacking a unity of purpose, the PRA is neither helpful nor relevant to discerning the zone of interest of the PES.

Moreover, the court below went beyond even the legislative history of the PRA to the "impetus" for the statute to broaden the zone of interest of the PRA to inject the Unions into the zone of interest of the PES. The court found that because "a key impetus for the PRA appears to have been a nationwide work stoppage by postal employees ...., a principal purpose of the PRA was to implement various labor reforms that would improve pay, working conditions and labor-management relations ...." App. 8a. Even if the court were correct in ascribing the "impetus" for the PRA, such judicially noticed impetus falls far short of any Congressional statement of legislative intent. In any event, while the contention that the purported impetus for the labor reforms was a work stoppage might arguably support the Unions' claims of standing to enforce those labor reforms, it begs the question of how enactment of the labor reforms bring the Unions within the zone of interest of the PES.

the prohibition was moved from the postal laws to the new criminal code. The only changes from prior law were alterations in style and the addition of the imprisonment penalty. See Special Joint Comm. on the Revision of the Laws, Revision and Codification of Law, Etc., S. Rep. No. 10, 60th Cong., 1st Sess., pt. 1. at 14-15, 20 (1908). The second codification was 18 U.S.C. §1696, ch. 645, 62 Stat. 777, in which only minor stylistic changes were made.

<sup>12</sup> See Report of House Committee on Post Office and Civil Service, Postal Reorganization and Salary Adjustment Act of 1970, H. R. Rep. No. 91-1104, 91st Cong. 2d Sess. (May 19, 1970) at 1-2; *People Gas, Light & Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1196 (7th Cir. 1981).

The only "interplay" between the statutes that the court relies upon for merging their zones of interest appears to be the recodification of the civil code parts of the PES in the PRA. That is at best coincidental or ministerial. There is simply no "interplay" between the PES and the PRA that is "relevant" to shedding light on the Congressional intent underlying the PES. Neither the PRA nor its legislative history reveals any Congressional consciousness of any benefits of the PES to postal employees or any strategy to inject labor into the preservation of the postal monopoly.<sup>13</sup>

Indeed, the real "impetus" for, the legislative intent behind, and statutory scheme embodied in, the PRA, if anything, distances postal employees from any arguable zone of interest of the PES. The key impetus for the PRA was the 1968 Kappel Commission Report<sup>14</sup> which recommended removing the Post Office from politics and operating it in an efficient, businesslike fashion. The opening lines of the report:

The United States Post Office faces a crisis. Each year it slips further behind the rest of the economy in service, in efficiency and in meeting its responsibilities as an employer. Each year it operates at a huge financial loss.

Kappel Report at 1. The Commission recognized the need for controlling costs by increasing productivity through automation, even if that meant a decline in employment. *Id.* at 3-6. As one commentator put it: "In the labor intensive Postal Service,

<sup>13</sup> See also, *People Gas*, fn 12, *supra.*, 658 F.2d at 1196, ("Only the consumer interest in postal services is arguably within the zone of interest protected by the [Postal Reorganization] Act").

<sup>14</sup> Report of the President's Commission on Postal Organization — entitled *Toward Postal Excellence* (June 1968), House Committee on Post Office and Civil Service, 94th Cong. 2d Sess., Comm. Print No. 94-25 (November 24, 1976) (Kappel Report).

controlling costs is synonymous with controlling *labor* costs...."<sup>15</sup> Not surprisingly, "[t]he most powerful and concentrated opposition [to the PRA] came from postal employee unions." Tierney at 15.

In short, the D. C. Circuit erred in reading the PRA, a statute opposed by plaintiffs as limiting postal employment, to confer standing under the PES to protect or increase such employment.

Third, the court of appeals has gone beyond the holding in *Clarke* that competitors will have standing under the zone of interest test to enforce statutes limiting competition. The *Clarke* decision does not support extending the zone of interest to employees of competitors, to say nothing of employees of quasi-governmental competitors administratively opting for increased competition. Nevertheless, after straining to find indirect standing under its "interplay" test, the court concluded that the Unions would be within the zone of interest even without the interplay between the PES and PRA. App. 8a. That conclusion raises three questions: (1) why consult the purposes of the PRA, if the Unions were so clearly within the zone of interest of the PES? (2) why create an unnecessary, undefined new "interplay" test? and (3) how do postal employees, who are neither competitors, nor representatives of remote areas threatened with curtailed service come within the zone of interest of either the PES provisions designed to protect service to remote areas or the suspension provision which protects the public interest?

Judicial restraint would obviate unnecessary inquiry into the PRA and creation of an "interplay" test. The court of appeals answers the third question by resorting to an injury in fact analysis:

<sup>15</sup> J. T. Tierney, *Postal Reorganization — Managing the Public's Business*, Auburn House (1981) at 51 (Tierney).

[C]ongressional intent to benefit the Unions is not required. That postal workers benefit from the PES's function in ensuring a sufficient revenue base, however, is scarcely deniable. Thus the Unions' interests arguably are within the zone of interests contemplated by the PES even when considered in isolation.

App. 9a. The court by defining the zone of interest, not by who Congress intended to enforce the statute or even intended to benefit, but instead by who is conceivably benefitted by the statute, reduced the zone of interest test to an inquiry into injury in fact.<sup>16</sup> This interpretation of the zone of interest test bears no resemblance to this Court's prior decisions and has been criticized by one Justice of this Court in *Community Nutrition*. See fn 5, *supra*.

In sum, the D.C. Circuit's decision below has misinterpreted *Clarke* and is bound to cause further confusion about the application of the zone of interest test of standing,

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<sup>16</sup> The D.C. Circuit's premise that postal employees benefit from the PES suffers from three erroneous assumptions: (1) that the PES requires maximization of revenues; (2) that maximizing revenues necessarily maximizes employment opportunities; and (3) that, therefore, any competition with the Postal Service will necessarily diminish employment opportunities. Nothing in the PES, the PRA, or their legislative histories requires the Postal Service to maximize revenues. To the contrary, the PRA created the Postal Rate Commission to help implement and regulate a cost-based rate structure. See 39 U.S.C. §§3601, 3621-3627 (1970). Maximizing revenues does not maximize employment. Indeed, the PRA requires the Postal Service to give primary consideration to speed and efficiency in setting all postal policy. 39 U.S.C. §101(e). Thus, considerations other than employment levels have priority over how revenues are allocated. Therefore, increased competition from the remail industry, whatever its effect on revenues, will have no predictable effect on postal employment levels. See *United Transportation Union v. Interstate Commerce Commission*, 891 F.2d 908, 914 (D.C. Cir. 1989).

unless this Court clarifies the test and reverses the decision below.<sup>17</sup>

### III. INTERPRET THE 39 U.S.C. § 601 PUBLIC INTEREST STANDARD

The second issue presented, interpretation of the suspension provision, is equally important. As the court of appeals noted, this case was the first occasion for an appellate court to interpret §601(b) in this context. 891 F.2d at 312. The Postal Service interpreted the public interest standard to have been met where it found the proposed remail rule to result in benefits to the general public, competition, see Statement of Chairman McKean at 6, *supra*, international competitiveness and remail users. App. 23, 24a. Without specifically articulating its interpretation of the public interest standard or any basis therefor in the PES or its legislative history, the court of appeals found the Postal Service's and district court's interpretation too "narrow." The court of appeals therefore erred in failing to give proper deference to the Postal Service's interpretation of the public interest standard. *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

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<sup>17</sup> The standing issue in this case is related to an issue pending consideration by the Supreme Court in *Department of Treasury v. Federal Labor Relations Authority*, cert. granted, \_\_\_ U.S. \_\_\_, 110 S.Ct. 47, 107 L.Ed.2d 16 (October 2, 1989). The question presented in that case is whether an agency's contracting out determinations made pursuant to Office of Management and Budget Circular No. A-27 are subject to grievance and arbitration under Title VII of 1978 Civil Service Reform Act if incorporated into a collective bargaining agreement. Thus, both cases deal with the deference to be accorded agency employees to challenge agency decisions permitting outsiders to perform tasks that the employees hope to preserve for themselves to protect their employment opportunities.

Apart from failing to justify its alternative interpretation of the public interest standard, the court of appeals' prescription is unsound and impractical, given the numerous types of service the Postal Service offers and types of customers it has. The court's construction would make any future rulemaking to suspend the PES into an unnecessarily drawn out, cumbersome and expensive proceeding.

The court of appeals' approach also violates the fundamental purpose of the PRA — operation of the Postal Service in more business-like fashion — and is at odds with the realities of institutional self-preservation. The Postal Service has every incentive to maintain the postal monopoly. On the centennial of the Sherman Act it is hardly debatable that the economic policy of this nation disfavors monopolies. When a monopolist may by law narrow its own monopoly and does so, it should be applauded instead of second-guessed. Rather than weighing down the suspension provision with considerations of the effect of a suspension on every conceivable special interest group of postal employees and patrons, the Postal Service should be presumed to be acting in the greater public interest when narrowing the scope of its own monopoly.

The burden should be on the party challenging any suspension provision to show a specific detriment to the greater public good. Such detriment should be one that is inconsistent with the goals of national economic integration underlying the PES. The Unions failed to offer any argument or factual support for any inconsistency between the remail rule and the public interest. Under these circumstances the Postal Service cannot be faulted for its consideration of the record before it, rather than some Platonic ideal of an administrative record it might have developed. Interpretation by the Supreme Court of the §601 public interest standard is an important question of federal law and administrative procedure.

## CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 8, 1990

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 19, 1989

Decided December 8, 1989

No. 88-5436

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, et al.,  
Appellants

v.

UNITED STATES POSTAL SERVICE,  
Appellee

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Appeal from the United States District Court for the  
District of Columbia

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*Keith E. Secular*, with whom *Anton G. Hajjar* was on brief for  
appellants.

*Wilma A. Lewis*, Assistant United States Attorney with whom  
*Jay B. Stephens*, United States Attorney, *John D. Bates*, *R. Craig  
Lawrence*, Assistant United States Attorneys and *Charles D. Hawley*,  
Attorney, United States Postal Service were on brief for appellee.

Before: WALD, *Chief Judge*, and MIKVA and RUTH B.  
GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

Concurring opinion filed by *Circuit Judge* RUTH B.  
GINSBURG.

MIKVA, *Circuit Judge*: Appellants in this action challenge the  
district court's grant of summary judgment for the United States Postal  
Service ("USPS" or "Postal Service"). The district court found that  
appellants lacked standing to seek review of a final order of the USPS  
which suspended the Postal Service's statutory monopoly to allow  
private entities to participate in a mail delivery market known as

international remailing. On the merits, the district court concluded that the USPS did not act arbitrarily, capriciously or beyond its statutory authority in promulgating the international remailing regulation. Appellants, the American Postal Workers Union, AFL-CIO and the National Association of Letter Carriers, AFL-CIO (collectively, "the Unions") assert that they are within the "zone of interests" implicated by the Private Express Statutes ("PES")—the statutes codifying the Postal Service's historic monopoly on the carriage of letters over postal routes. The Unions challenge the USPS's wholesale suspension of the international remailing restriction as arbitrary, capricious and not supported by a sufficient factual showing that the "public interest" required such suspension.

We agree. The district court correctly concluded that the Unions satisfy the requisites for article III standing. We find, however, that the district court erred in concluding that the Unions' interest in preserving employment opportunities bears no reasonable relationship to the purposes of the PES. Because the Private Express Statutes are an integral part of a comprehensive statutory scheme which clearly addresses the welfare and employment of postal employees, we conclude that the Unions are within the zone of interests of the PES. The USPS's suspension of the PES to allow unrestricted international remailing by private entities constitutes arbitrary and capricious agency action because the USPS did not develop a record to project the impact of the suspension on uniform postal rates and service. Consequently, we remand this case to the district court to vacate its order and allow the USPS to reopen its proceedings or take other action consistent with this opinion.

## I. BACKGROUND

The Private Express Statutes historically have granted to the USPS a monopoly over the carriage of letters by prohibiting, with certain exceptions, private competition in conveying letters over postal routes. See 18 U.S.C. §§ 1693-1699, 1729 (1982); 39 U.S.C. §§ 601-606 (1982). The USPS may "suspend [the Private Express restrictions] upon any mail route where the public interest requires the suspension." 39 U.S.C. § 601(b). In 1979, the Postal Service exercised its authority under § 601(b) to suspend the PES for the carriage of

extremely urgent letters, otherwise known as express mail or overnight service. See 44 Fed. Reg. 61,181 (Oct. 24, 1979). As a result, private mail services began to rely on the urgent letter suspension to support the practice of "international remailing," or carriage of letters overseas for deposit into foreign postal systems—thus allowing users of this service to bypass completely the U.S. Postal Service. In October of 1985, the USPS announced its intention to amend the urgent letter suspension to limit sharply its applicability to international remailing. See 50 Fed. Reg. 41,462 (Oct. 10, 1985). This proposal was greeted with massive opposition from the business community and the disapproval of several members of Congress and senior executives in the Reagan Administration. Opponents argued primarily that preventing private remailers from offering inexpensive, speedy service would jeopardize the ability of American companies to compete for business abroad.

In March of 1986, the Chairman of the Postal Service's Board of Governors, John McKean, announced the USPS's intention to initiate another rulemaking proceeding "to remove the cloud that now hangs over the international remail services and preserve the benefits of desirable competition between the Postal Service and private companies." The USPS withdrew its earlier proposal and began considering whether to suspend the PES to allow international remailing. See 51 Fed. Reg. 9652 (March 21, 1986). Two rulemaking notices to this effect and a public meeting produced little additional factual information.

On August 20, 1986, the USPS published a final rule suspending the PES to permit unrestricted international remailing. See 51 Fed. Reg. 29,636. The regulation allows private carriers to deliver mail from the United States directly to foreign postal systems, bypassing the USPS, without meeting certain cost conditions that applied under the urgent letter suspension. See 39 CFR § 320.8 (1988). Responding to the Unions' complaint that the record was inadequate to support a "public interest" finding, the USPS stated:

The Postal Service ... sought ... to obtain precise and detailed information regarding the level of services provided by remailers, and the benefits which [their] customers . . . derive. It may well be, however, that

because of the diverse character of the remail industry and the relatively recent development of remailing, the comprehensive information we had hoped to receive to supplement the essentially anecdotal information, which was furnished to us, is not available. Nonetheless, the Postal Service has compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension.

51 Fed. Reg. 29,637 (Aug. 20, 1986). Indeed, in its final notice of proposed rulemaking the USPS had emphasized the sketchy nature of the factual record, referring to the "anecdotal character" of tables charting relative delivery times, the "imprecision of the data" on the need of U.S. businesses for private international remailing, and the presence of "little or no reliable information as to the amount of revenues diverted to date by the activities of remailers." 51 Fed. Reg. 21,931 (June 17, 1986).

The Unions filed suit in the district court, seeking declaratory and injunctive relief against enforcement of the international remailing regulation. The district courts have original jurisdiction over suits by or against the Postal Service. 39 U.S.C. § 409 (1982). Although the USPS is exempt from the strictures of the Administrative Procedure Act ("APA"), see 39 U.S.C. § 410(a), it has chosen to follow APA procedures when promulgating rules affecting the PES. See 39 CFR § 310.7 (1988). Therefore, the APA provides the appropriate standards for evaluating the procedural and substantive issues in this case.

Issuing a memorandum opinion, the district court granted the Postal Service's motion for summary judgment. Because the suspension threatened workers with the prospect of reduced employment opportunities, the court found that the Unions met the constitutional requirements for standing under Article III. The court concluded, however, that the Unions were not within the zone of interests implicated by the PES. Applying *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), the court reasoned that the Unions' interests bore no reasonable relationship to the purposes of the PES because those statutes were "designed to ensure only that the Service maintains sufficient revenue to be able to provide efficient and effective mail delivery services to all aspects of the market." In addition, the court

asserted that, in certain circumstances, the interests of the Unions might diverge from the purposes of the PES because Congress, in enacting the "public interest" exception, recognized that there might be situations in which the revenue objectives of the PES could be achieved without the benefit of a monopoly. Finally, the court concluded that a finding of standing in this case implicitly would afford standing "to any agency employee whose job or employment opportunities were threatened as a result of an agency decision."

On the issue of statutory authority, the court reasoned that the "public interest requires" language of § 601(b) conferred broad discretion on the Postal Service "to define the public interest in a given situation and to act accordingly." The court concluded that the suspension decision was made on a reasoned basis, rejecting the charge that the evidence was inadequate. While the court acknowledged "the relative dearth of empirical data" in the record, it relied upon court precedents which upheld agency decisions lacking factually specific support. See, e.g., *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-814 (1978) (factual specificity not always required where "a forecast of the direction in which future public interest lies necessarily involves deductions based upon the expert knowledge of the agency").

## II. ANALYSIS

### A. Standing

The law of standing is based on a set of constitutional and prudential requirements. To establish standing under article III of the Constitution a litigant must plead an injury in fact fairly traceable to the conduct complained of and likely to be redressed by the relief requested. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Prudential standing requires that the "plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982) (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (footnote omitted). That the Unions satisfy the constitutional requirements for standing is not in doubt. Allowing private international remailers to compete directly with the

Postal Service threatens postal workers with the prospect of reduced employment opportunities. See, e.g., *American Postal Workers v. React Postal Services, Inc.*, 771 F.2d 1375, 1380 (10th Cir. 1985) (“[W]henver a private entity is allowed to perform the tasks of collection, sortation, delivery, etc. in competition with the USPS, the employment opportunities of the postal workers are inevitably reduced.”). Such threatened injury is sufficient to satisfy the “injury in fact” prong of the test for article III standing. See *Valley Forge*, 454 U.S. at 472.

At issue in this case is whether the Unions’ interest in retaining employment opportunities satisfies the “zone of interests” test as iterated by the Supreme Court in *Clarke v. Securities Industry Association*, 479 U.S. 388, 399-400 (1987). The Unions’ cause of action derives from § 702 of the APA, which grants standing to a person “aggrieved by agency action within the meaning of the relevant statute.” 5 U.S.C. § 702 (1982). In *Clarke*, the most recent instruction from the Supreme Court on the subject, the Court acknowledged that the zone of interests test is a gloss on § 702 of the APA that provides some limits on access to the courts. The *Clarke* Court, however, in several places admonished this circuit and others in general for a somewhat parsimonious approach to the law of prudential standing, stating that “there need be no indication of a congressional purpose to benefit the would-be plaintiff.” 479 U.S. at 399-400 & n.15. Again, the Court asserted that the test “is not meant to be especially demanding,” and that there need be only “a plausible relationship” between the interests propounded by the plaintiff and the policies undergirding the statutory framework. Pp. 396, 399, 403. Finally, the Court reaffirmed an established presumption in favor of judicial review. Would-be plaintiffs should be allowed into courts unless they are “not even ‘arguably’ within the zone of interests to be protected or regulated by the statute.” P. 397 (emphasis added, citation omitted). This presumption would seem to operate with particular favor for those plaintiffs that satisfy the constitutional requirements for standing.

As the *Clarke* Court explained, the zone of interests test serves as our guide for deciding whether “in view of Congress’ evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency action.” P. 399. In cases such as this, where the would-be plaintiff is not the subject of

the contested regulation, the test denies standing only if “the plaintiff’s interests are so *marginally related* to or *inconsistent* with the purposes *implicit* in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” P. 399. (emphasis added).

Turning to the circumstances of this case, we are easily convinced that the Unions’ concerns have more than a “marginal” relationship to the purposes implicit in the PES. The district court erred in focusing too narrowly on the functions of the PES in isolation from the entire Postal Reorganization Act of 1970 (“PRA”), of which the PES are a part. When attempting to discern the scope of interests embraced by a particular legislative provision, courts may look to the purposes animating the entire statutory framework. See *Clarke*, 479 U.S. at 401 (“[W]e are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress’ overall purposes in the National Bank Act.”); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 & n.2 (1970); see also *National Coal Association v. Hodel*, 825 F.2d 523, 529 (D.C. Cir. 1987) (looking beyond the Federal Land Policy and Management Act of 1976 (FLPMA) to other legislation aimed at the coal industry in order to “flesh out the meaning of the term ‘public interest’ ” in the FLPMA); *Wilderness Society v. Griles*, 824 F.2d 4, 18 n.11 (D.C. Cir. 1987) (“Thus, plaintiffs ... appear to fall within the zone of interests of the statutory scheme represented by three complementary enactments.”).

This court’s approach in *National Coal Association* is instructive. In that case, § 206 of the FLPMA authorized the Secretary of the Interior to dispose of public lands by exchange where “the public interest” would be well served. In order to “flesh out” the meaning of the term “public interest” for prudential standing purposes, the court looked not only to the language and purposes of the FLPMA but also to the concerns informing separate legislation having related objectives. *National Coal Ass’n*, 825 F.2d at 529.

An examination of the function of the PES in advancing the goals of the entire PRA demonstrates the relevance of the PRA to our zone of interests inquiry. The PRA revamped the nation’s postal system, rendering the Postal Service politically independent by endowing it with financial and budgetary authority previously confided in Con-

gress. In enacting the PRA, Congress incorporated without substantive modification private express provisions which originate from a statute passed in 1792, when Congress first embraced the concept of a postal monopoly. See Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236. In Section 7 of the PRA, Congress directed the new Postal Service to reevaluate the PES and report on the continuing need for a postal monopoly. In 1973, the Board of Governors submitted the requested report, concluding that "the basic protections of the Private Express Statutes must be retained if this country is to continue to have effective universal mail service reaching into every community and serving all parts of the nation." Board of Governors, *Statutes Restricting Private Carriage of Mail and Their Administration*, Comm. Print No. 93-5, 93d Cong., 1st Sess. 1 (June 29, 1973). Thus, the PES, which continue the postal monopoly, play a pivotal role in achieving an important purpose of the PRA: to "provide prompt, reliable, and efficient services to patrons in all areas and ... render postal services to all communities." 39 U.S.C. § 101.

A key impetus for the PRA appears to have been a nationwide work stoppage by postal employees which occurred in March, 1970. See H.R. Rep. No. 1104, 91st Cong., 2d Sess. 3 (1970). Therefore, a principal purpose of the PRA was to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees. See *id.* at 2-4, 13-14. The Postal Service asserts that the other statutory provisions of the PRA should be looked to only if they bear some relationship to the purposes of the PES. Yet, to assess whether the Unions fall within the zone of interests of the PES we need not create nice distinctions between the PES and the PRA where Congress itself did not. As the *Clarke* Court made clear, the presumption in favor of judicial review is overcome only when "congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" 479 U.S. at 399 (quoting *Data Processing*, 397 U.S. at 157). The legislative history of the PRA leads inexorably to the opposite conclusion. The Unions' asserted interest is embraced directly by the labor reform provisions of the PRA. The PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service. The interplay between the PES and the entire PRA persuades us that there is an "arguable" or

"plausible" relationship between the purposes of the PES and the interests of the Union.

We are equally convinced that the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities. The PES were designed specifically to prevent private mail services from "cream-skimming" the most profitable mail services by undercutting the Postal Service on low cost, high-profit routes, thereby leaving the Service with less revenue to fulfill the requirement of providing service throughout the nation at uniform rates. Doc. No. 1, 28th Congress, 1st Sess. 596 *et seq.* (December 2, 1843), quoted in J. Haldi, *Postal Monopoly: An Assessment of the Private Express Statutes* 9 (1974); 39 U.S.C. § 101, § 3623(d); see also *Regents of the Univ. of California v. Public Employment Bd.*, 108 S.Ct. 1404, 1408 (1988) ("Because Congress desires 'prompt, reliable, and efficient services to [postal] patrons in all areas,' it has enacted the Private Express Statutes and has provided for nationwide delivery of mail at uniform rates.") (citations omitted). As stated above, congressional intent to benefit the Unions is not required. That postal workers benefit from the PES's function in ensuring a sufficient revenue base, however, is scarcely deniable. Thus the Unions' interests arguably are within the zone of interests contemplated by the PES even when considered in isolation. The district court's reasoning that there may be circumstances in which the interests of the Unions will diverge from the purposes of the PES, exacts too demanding a standard for meeting the zone of interests test. The relationship of the plaintiff to the statute need only be arguable, not wholly coincident. Instead of requiring an *a priori* showing that no conflicts could possibly ensue from a grant of standing, the zone of interests inquiry only "seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 479 U.S. at 397 n. 12.

The PES reflect a congressional presumption that a postal monopoly will be maintained to the extent necessary to ensure universal service at uniform postal rates. Hence the Unions would seem to be appropriate plaintiffs to vindicate Congress' intent that the USPS reduce the scope of this monopoly only when clearly required by the public interest. This reasoning accords with an earlier decision of this circuit which found a union to be an appropriate challenger of agency

action involving a statutory guarantee of a domestic monopoly. See *Autolog Corporation v. Regan*, 731 F.2d 25, 30 (D.C. Cir. 1984) (union representing American seamen was within the zone of interests of the coastwise laws which create a monopoly for domestic shippers, because such laws protect the livelihood of union members). Similarly, an association representing the interests of business owners licensed to operate in a particular industry is within the zone of interests of a law that restricts entry of would-be competitors into that industry. See *Panhandle Producers and Royalty Owners Association v. Economic Regulatory Administration*, 822 F.2d 1105, 1109 (D.C. Cir. 1987) (“[O]ne need not be a cynic to understand competitors’ success in seeking to enforce licensing barriers: their interests are generally congruent with a statutory purpose to restrict entry.”).

We emphasize that this case is in a different genre from *National Federation of Federal Employees v. Cheney*, No 88-5271, slip op. (D.C. Cir. August 25, 1989). In that case a union contested a United States Army decision to “contract out” to private contractors the services previously provided by federal employees at the Directorate of Logistics in Fort Sill, Oklahoma. The majority found that the union did not fall within the zone of interests of any of the three statutory schemes at issue, either because the legislative history of the statute did not indicate “that Congress contemplated in-house federal employees or federal employee labor unions” as a particular class of plaintiffs to be relied upon to challenge agency disregard of the law, *id.* at 11, or because the interest asserted by the union was antithetical to the pro-competitive objectives of the statute. *Id.* at 22, 25. In contrast, the legislative history of the PRA reveals a clearly expressed concern for the welfare and employment conditions of postal workers. More importantly, the PRA codified a postal monopoly dating back to the late eighteenth century. Unlike the contracting-out provisions at issue in *NFFE v. Cheney*, the presumption established by the PES is against allowing private competition. For this reason the Unions’ interests are largely congruent with the purposes of the PES.

In light of the special emphasis which the PRA places on the welfare of postal employees and the unique role of the PES in maintaining the financial viability of the Postal Service, we must reject the district court’s conclusion that affording standing in this case implicitly would grant standing under § 702 to any agency employee

whose employment opportunities were threatened as a result of an agency decision. We recognize that agencies frequently face decisions which could result in reduced employment opportunities for their employees. The Postal Service, however, is charged with the responsibility of preventing unwarranted dissipation of an historic postal monopoly. Congress has imposed an obligation, largely congruent with the interests of postal employees, that is much stronger than those embodied in most statutory schemes under which disgruntled agency employees might sue. Contrary to the district court’s implication, “standing is not to be denied simply because many people suffer the same injury.” *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973).

The Unions alternatively claim standing as users of the mails. Because we find that their interest in retaining employment opportunities falls within the zone of interests of the PES, we need not resolve this claim.

#### B. The Merits

The USPS’s decision to suspend completely the PES with respect to international remailing rests chiefly on its finding that this would benefit American businesses by providing them with faster, cheaper service — thereby enhancing their ability to compete in international markets. In its notice of final rulemaking, the USPS conceded that much of the evidence in support of these benefits was testimonial in nature, but the Service was persuaded by the virtual unanimity of the comments offered by businesses using the services of private remailers. See 51 Fed. Reg. at 29,637 (Aug. 20, 1986). Although the USPS did not discuss revenue impact in its final notice, it did conclude in an earlier notice of the proposed suspension that the total potential loss of revenues — \$882 million, representing all revenues from international mail in 1985 — would not be “so adverse to the Postal Service as to outweigh allowing remailing to continue by virtue of the [proposed] suspension.” 51 Fed. Reg. at 21,931 (June 17, 1986).

The Unions offer three core arguments to challenge this rulemaking as arbitrary and capricious. First, they contend that none of the factors relied upon by the Postal Service represents a legitimate rationale for suspending the PES. Second, they aver that the alleged benefits are not supported by concrete evidence in the record. Third,

they argue that the Postal Service rejected without explanation more "tightly drawn and narrowly restricted" alternatives in favor of the broadest possible suspension, permitting all forms of international remailing.

The scope of judicial review of agency action for arbitrariness and caprice is narrow. A reviewing court cannot substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). In order to guard against agency inferences that are "arbitrary," however, the court must engage in a "thorough, probing, in-depth review" of the agency's asserted basis for decision, ensuring that "the agency ... [has] examine[d] the relevant data and [has] articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.' " *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Our task is rendered more difficult in this case by the sweeping nature of the "public interest requires" standard for justifying suspensions. The district court reasoned, and the Postal Service echoes, that by using this language in § 601(b), Congress vested the Service with the discretion to "define the public interest in a given situation and to act accordingly." While this appears to be the first occasion in which an appellate court has interpreted § 601(b) in this context, we are not without the guidance of numerous court opinions interpreting similar "public interest" language often used by Congress in giving regulatory agencies their marching orders. *See, e.g., Central Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 314-15 (D.C. Cir.), *cert. denied*, 474 U.S. 1019 (1985) (describing the Interstate Commerce Commission's broad authority to allow certain exemptions when in the "public interest" as "a congressional charge to 'go forth and do good'"). The district court relied on a single Supreme Court case, *FCC v. WNCN Listeners Guild*, which held that the "public interest, convenience, and necessity" standard governing the FCC's licensing authority conferred broad discretion on that agency to implement its view of the public interest standard "so long as that view is based on consideration of permissible factors and is otherwise reasonable." 450 U.S. 582, 593-94 (1981) (quoting *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978)). Yet, as

the preceding passage shows, a "public interest" standard does not confer *unfettered* discretion on the agency administering it.

As in *WNCN Listeners Guild*, the term "public interest" is not defined in the Private Express Statutes. We have no doubt that Congress intended to confer a substantial degree of discretion on the USPS. The scope of that discretion is a matter of statutory interpretation. In the "pre-Chevron" era the Supreme Court stated that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purpose of the regulatory legislation." *NAACP v. FPC*, 425 U.S. 662, 669 (1976). In *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court clarified the standard of review applicable to an agency's interpretation of the statutes it administers. This court has aptly summarized the *Chevron* analytical framework:

We first examine the text of the implicated statute and, where appropriate, its legislative history; using traditional tools of statutory construction, we seek to determine whether and how Congress resolved specific issues of law raised in the proceeding under review, and confine the agency to consistency with Congress' intent. If we find that Congress did not clearly resolve those issues, however, we must accept the agency's interpretation *so long as it is reasonable* — i.e., "rational and consistent with the statute."

*Midtec Paper Corporation v. United States*, 857 F.2d 1487, 1496-97 (D.C. Cir. 1988) (citing *NLRB v. United Food & Commercial Workers Union, Local 23*, 108 S. Ct. 413, 421 (1987); *Chevron*, 467 U.S. at 842-45) (emphasis added). In cases such as this, where Congress has assigned broad authority to an agency — specifying only that a non-defined "public interest" requires agency action — this court has applied the second prong of the *Chevron* analysis, upholding agency interpretations where reasonable. In our view, *Chevron* reasonableness review of an agency's interpretation of a "public interest" standard is not empty rhetoric; it is intended to have a limiting effect on the range of agency discretion. *See, e.g., Midtec Paper*, 857 F.2d at 1500 ("In order to support its exercise of discretion, the agency must provide

a reasoned analysis that is not manifestly contrary to the purposes of the legislation it administers.”); *Central & Southern Motor Freight*, 757 F.2d at 321 (“[E]xceptions to a statute are not to be construed in such a manner that they ‘defeat rather than further the purpose of Congress.’”).

Although we recognize the broad discretion conferred upon the agency, we believe that its apparently narrow interpretation of the “public interest” in this case frustrates the core purpose of the PES. The Postal Service considered only the benefits which apparently would redound to a single segment of the Service’s consuming public: businesses engaged in commerce overseas. In the context of the purposes of the PES, the USPS also should have considered the impact of the proposed suspension on those consumers who would continue to use the Postal Service, both from a price and service perspective. Indeed, as stated above, the fundamental purpose of the PES is to prevent private competitors from “cream-skimming” profitable routes, thereby providing the Postal Service with sufficient revenue to fulfill its mandate of providing service throughout the nation and at uniform rates. The USPS’s interpretation of the “public interest” is not reasonable because it did not give sufficient attention to how revenue losses might affect cost and service of other postal patrons.

The USPS’s own analysis in accepting the urgent letter suspension supports our reasoning. The Service limited that suspension to mails meeting prescribed “loss of value” or “cost” conditions because

[t]his [measure] is designed to protect the postal system against the inroads or “cream-skimming” by private couriers solely on the basis of their ability to undercut postal rates selectively. It is intended to test whether the shipper looks to a private carrier because he genuinely attaches an importance to prompt delivery, or simply because he desires to reduce shipping costs selectively. *If selective cost savings were sufficient grounds to use a private courier to carry letters, the Private Express Statutes would be effectively nullified.*

44 Fed. Reg. 40,076 (July 9, 1979) (emphasis added). Despite the soundness of this reasoning, the USPS proceeded in this case to ignore

it, indeed to contravene it directly, by justifying an unqualified suspension solely on the selective cost and service benefits to businesses engaged in international commerce. This approach is unreasonable, arbitrary and capricious. *Cf. Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1091-92 (D.C. Cir.), *cert. denied*, 108 S. Ct. 1088 (1988) (holding that agency administering a “public interest” standard did not engage in reasoned decisionmaking when it focused only on the economic impacts accruing to one segment of the power consuming public).

The Postal Service replies that it did consider revenue impact by factoring into its analysis (although not in its final rulemaking) an estimate of the total potential loss of revenue from an unrestricted international remailing suspension. Again, the only public “impact” which the Service assessed was the selective cost savings and service benefits to the business sector. Given that such selective evidence is not, without more, a sufficient justification for a suspension, a cursory, lump-sum analysis of the potential revenue loss hardly amounts to a reasoned assessment of the impact on uniform postal rates and service. Such tepid reasoning makes it impossible for this court to discern whether the suspension is indeed reasonable or consistent with the purposes of the PES. The Unions argue, for example that international mail rates have increased substantially as a result of the “skimming” of volume of international remailers pursuant to the urgent letter suspension). Yet no analysis even approaching such specificity was undertaken by the Postal Service in its rulemaking below.

Contrary to the urging of the Unions, however, this court may not impose its own rigid interpretation of the “public interest.” We are unwilling to say that the USPS may not consider the benefits of a proposed suspension to businesses engaged in commerce abroad, including their enhanced competitiveness in the international arena. Neither are we willing to say that there are no circumstances in which the Service could justify a suspension to allow unrestricted international remailing. The Unions are correct in asserting, however, that where several more narrowly defined suspension alternatives were under consideration, the USPS acted arbitrarily and capriciously in not explaining its reasons for rejecting these alternatives. *See International Ladies’ Garment Union v. Donovan*, 722 F.2d 795, 815-18 (D.C. Cir.), *cert. denied*, 469 U.S. 820 (1984). The Postal Service submitted

to the district court a declaration of Charles D. Hawley, its Assistant General Counsel, which provides reasons as to why the alternatives were rejected. Even if these reasons are accurate, this court "may not accept [agency] counsel's *post hoc* rationalizations for agency action.... [A]n agency's action must be upheld ... on the basis articulated by the agency itself." *Motor Vehicle Mfrs.*, 463 U.S. at 50.

Finally, because we find that the USPS did not engage in reasoned decisionmaking due to its insufficient attention to the impact of the suspension on all postal patrons, we need not reach the question of whether the evidence of the selective benefits to the business community was sufficient. We note merely that agencies are entitled to engage in predictive judgments of the future public interest and that a "complete factual support" is not required where such predictions "necessarily involve[] deductions based on the expert knowledge of the agency." *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978). Yet, agencies are not free to engage in unreasoned decisionmaking. Specifically, agencies cannot "ignore important factors in making predictions, or ... reach judgments that are irrational given the relevant evidence in the record." *International Ladies Garment Union*, 722 F.2d at 821 n.56.

### III. CONCLUSION

We find that a faithful application of the recent teachings of the Supreme Court on prudential standing establishes that the Unions clearly fall within the "zone of interests" of the Private Express Statutes. Although the Postal Service may be able to justify a wholesale suspension of the PES with respect to international remailing, we conclude that the record before us does not reflect sufficient consideration of the core purposes of the Statutes. Because the impact of the proposed suspension on all of the Postal Service's patrons was never seriously considered and because the USPS failed to explain why narrower alternatives were rejected, the rulemaking was arbitrary and capricious in violation of the APA. 5 U.S.C. § 706(2)(A). We therefore remand to the district court to vacate the grant of summary judgment and to allow the agency an opportunity to reopen its proceedings or take any other action consistent with this ruling.

*It is so ordered.*

GINSBURG, RUTH B., *concurring*: While I concur in the court's opinion, I write separately to highlight a disturbing facet of this case. The Postal Service, as the historical record confirms, initially sought to maintain tight restraints on international remailing by private carriers. See 50 Fed. Reg. 41, 462 (Oct. 10, 1985). Its effort to confine the practice encountered the concerted opposition of the business community and the Department of Justice. In a *volte-face*, the Service then devised a rule broadly permitting international remailing. I agree with my colleagues that the Service did not draw from the rulemaking record reasons adequate to justify its action. I emphasize, however, that the Service, in accounting for its action, did not home in on comments in the record emphasizing that international remailing is different from domestic mail service, and suggesting that private competition in the international remailing market can be cordoned off safely without opening the way for seriatim inroads on the Postal Service monopoly.<sup>1</sup> On remand, the Service could focus its sights more precisely on the international/domestic mail delivery differential.

In finding that the public interest requirement was met in this case, the Service rested on "almost universally consistent ... observations" that remailing was faster and cost less than U.S. airmail. 51 Fed. Reg. 29,636, 29,637 (Aug. 20, 1986). These savings in time and cost, the Service found, "enhanc[ed] the ability of American firms to compete abroad." *Id.* In conclusion, the Service acknowledged comments favoring allowance of international remailing operations made by the Department of Commerce, the Department of Justice, and the Office of Management and Budget. *Id.* The Postal Service monopoly would quickly crumble, however, if the public interest required suspension of the Private Express Statutes whenever a private carrier could serve U.S. businesses faster and at a lower price. Commenters accordingly featured something more. Because international mail is distinct and separable from stateside postal operations, they reasoned, the international remailing permission at issue would leave intact the solid core of the monopoly decreed by Congress.

<sup>1</sup> The remailing service at issue raises no question under international mail reciprocity agreements, as counsel for appellants conceded at argument. *But see* Reply Brief of Plaintiffs-Appellants at 9. Foreign governments would not have the problem of dealing with multiple originating mail suppliers, for the remailers simply deposit the letters they carry in the mails of foreign postal administrations.

Commenters stressed this key point: the domestic monopoly leaves all mailers in the same boat, but extending that monopoly to the international arena put U.S. businesses at a marked disadvantage relative to their foreign competitors. *See* Joint Appendix (J.A.) at 124, 137, 138, 164. Commenters further observed that outgoing international mail imposes on the Postal Service far fewer capital and operational costs than does domestic mail. The Postal Service simply packages overseas missives and puts them on a ship or plane; a foreign postal service does the delivery work. There are no "small towns" to be served by the Postal Service at great cost. *See* J.A. at 143, 306, 373. The cost-of-service differential suggests that, in comparison to the domestic arena, a monopoly in the international domain is less vital to the Private Express Statutes' goal of assuring universal, affordable service.

Similarly, and of special relevance to the union's concerns, commenters noted that the Postal Service freight forwarding operation for international mail is not labor intensive; therefore, these commenters said, international remailers posed no large threat to postal jobs. J.A. at 149. Furthermore, comments emphasized the limited character of the service at stake: international remailers deal with bulk mailings for large business mailers. J.A. at 210.

In sum, the comments invited close attention to the question whether international mail should be distinguished from domestic mail in implementing legislation, the Private Express Statutes, designed to "bind the Nation together" through universal service at a uniform price. *See* J.A. 305. That question could be pivotal in the further examination this court has ordered.<sup>2</sup>

<sup>2</sup> Some commenters, most notably the Department of Justice, questioned whether Congress intended to grant the Postal Service a monopoly over international mail as well as domestic mail. *See* J.A. at 196-202; *see also id.* at 261, 395, 473, 516, 640. In view of the firm position of the Postal Service that the Private Express Statutes apply to international shipments of letters, *see* 51 Fed. Reg. 21,929, 21,930 (June 17, 1986), lower courts properly reserve this question for legislative clarification. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

## **Postal Service 39 CFR Part 320**

### **Restrictions on Private Carriage of Letters; Suspension of the Private Express Statutes; International Remailing**

**AGENCY:** Postal Service.

**ACTION:** Final Rule.

**SUMMARY:** This final rule suspends the operation of the Private Express Statutes, 18 U.S.C. 1693-1699, 39 U.S.C. 601-606, with respect to international remailing so as to permit the private, uninterrupted carriage of letters from the United States to a foreign country for ultimate delivery outside of the United States.

**EFFECTIVE DATE:** September 19, 1986.

**FOR FURTHER INFORMATION CONTACT:** Charles D. Hawley (202) 268-2971.

**SUPPLEMENTARY INFORMATION:** On June 17, 1986, the Postal Service proposed to suspend the Private Express Statutes to permit "international remailing." The adoption of this rule completes a public rulemaking process that began with the publication of a Notice of Proposed Rulemaking in October 1985.

"International remailing" consists of the carriage by private firms of shipments of letters, addressed to persons outside the United States, entirely outside of the United States Mails to foreign countries where the letters are deposited into the mails of foreign postal administrations.

The proposal published in the Federal Register of October 10, 1985, 50 FR 41462, would have amended the regulation establishing the administrative suspension of the Statutes for extremely urgent letters, 39 CFR 320.6, so as to make clear that this suspension, which had not been intended to authorize remailing, did not in fact do so. Most of the comments submitted in response to the notice opposed the proposal, and instead supported the practice of remailing. Subsequently, on March 4, 1986, the Chairman of the Board of Governors of the Postal Service announced that the Postal Service would commence a new rulemaking proceeding to establish the lawfulness of remailing.

On March 21, 1986, the Postal Service published a Federal Register notice which withdrew the October 10, 1985 proposed rule, and solicited information on the nature and extent of remailing and on the benefits derived by the public from this practice. 51 FR 9852. In addition, the Postal Service, following the close of the period established for response to the March 21 solicitation, held a public meeting on May 22, 1986.

(Notice of this meeting was published on May 12, 1986, 51 FR 17366). The information garnered in the successive steps described above forms the factual record upon which the Postal Service based the proposal, in the Federal Register on June 17, 1986, to permit remailing.

Nine additional comments were submitted in response to the June 17 notice. Eight of the comments expressed support for the proposal. Five expressed general support for the suspension and did not suggest any specific changes; three suggested that the suspension be modified in various ways. After careful consideration of all the comments, including those submitted in previous, related proceedings, the Postal Service, also bringing to the process its knowledge of and experience with the international mails, has concluded that the proposed suspension should be adopted without substantial modification. The statement of the purpose of this rule and the basis for it, which was published in the June 17 notice, and also the March 21 notice, are incorporated herein and form integral parts of this notice.

#### **Applicability of Private Express Statutes to International Remailing**

Two of the comments submitted in response to the June 17 notice, although generally supporting the proposal, raised the threshold questions of whether the Private Express statutes have any applicability to the international carriage of letters and whether the Postal Service has the authority to adopt a suspension to regulate the international private carriage of letters. These questions had been raised in the earlier comments and were carefully considered at that time. The Postal Service reiterates its statement on these questions which was published in the June 17 notice.

On the matter of the authority to regulate international remailing, one comment contended that this power should be vested in the

Executive Branch, in particular the Department of Justice, and not the Postal Service. The comment also suggests that rather than adopting a regulation, the proposed suspension should be recast as a statement of general policy. In adopting the suspension, however, the Postal Service is acting pursuant to authority specifically and exclusively delegated to it by Congress in the Private Express Statutes themselves, 39 U.S.C. 601(b). The Postal Service is also empowered under 39 U.S.C. 401(2) to adopt, amend, and repeal regulations in order to further the objectives of title 39. *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824, 826 n.5 (D.C. Cir. 1979). This title, of course, includes the statute noted above which authorizes the suspensions. Finally, the Postal Service is itself an independent establishment in the Executive Branch, 39 U.S.C. 201, and as such it is generally not responsible to other Executive Branch agencies in promulgating postal regulations. Nonetheless, the Postal Service has solicited the views of various agencies and has received and considered comments on these proposals from several agencies.

#### **Nonapplicability of Suspension for Extremely Urgent Letters to Remailing**

Several comments noted that in adopting a new suspension for remailing the Postal Service is implicitly concluding that the suspension for extremely urgent letters, 39 CFR 320.6, ought not be interpreted as itself permitting remailing. While two comments agreed with this rationale, a third requested that this interpretation be expressly repudiated. The Postal Service, by adopting this suspension for international remailing, has expressly and forthrightly determined that the practice will be permitted, and has stated the conditions under which it will be permitted. The Postal Service has also concluded that remailing need not be sanctioned under the color of a suspension which was intended for another purpose.

#### **Prohibition on Ultimate Delivery Within the United States**

One comment objected to the provision which requires that letters carried pursuant to the suspension not be ultimately delivered within the United States. The comment contends that this provision should not be adopted because remailing back into the United States

is negligible, and because this limitation is said to prevent Americans from availing themselves of lower postage rates that are offered to non-Americans. These objections are not persuasive, as explained in the June 17 notice.

The new suspension is not intended to allow the practice of mailing, in a foreign country, matter which is subsequently shipped by the postal administration of that country through the United States as open or closed transit mail, under circumstances which cause the United States to incur expenses for which it is not reimbursed. This caveat does not prohibit the private carriage of letters for remailing if that carriage is within the terms of the new suspension, but neither does the suspension limit the remedies available to the Postal Service with respect to transit mail.

#### **Inspections and Audits**

With regard to subsection (c) of the suspension, one comment suggested that this provision should be modified to include inspection and audit guidelines, and also to include a requirement that the Postal Inspection Service provide the shipper with advance notice of an inspection or audit, absent reasonable cause to suspect activity not in conformity with the regulation. Another comment advanced the view that subsection (c) should not be adopted because it exceeds the authority of the Postal Service. The Postal Service has concluded that the suggested inclusion of special inspection and audit guidelines in this regulation is unnecessary because these are well established functions of the Inspection Service. The authority of the Postal Service to investigate postal offenses and civil matters relating to the Postal Service is specifically provided by statute, 39 U.S.C. 404(a)(7). We note, moreover, that a similar provision has been included previously in a suspension of the Statutes. See 39 CFR 320.6(e), and compare 39 CFR 320.3(d). The Postal Service has, however, determined that wording in subsection (c) should be modified to read:

The failure of a shipper or carrier to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service... This minor modification makes it clear that it is the Postal Inspection Service which authorizes and conducts the inspections and audits.

#### **The Factual Record as Supporting the Suspension**

The comment opposed to adoption of the suspension asserted that the record is inadequate to support the adoption of the regulation, and that it is not manifest from the record that the public interest requires the establishment of the suspension. The Postal Service had sought, in its notice of March 21, 1986, and subsequently, to obtain precise and detailed information regarding the level of services provided by remailers, and the benefits which the customers of the latter derive. It may well be, however, that, because of the diverse character of the remail industry and the relatively recent development of remailing, the comprehensive information we had hoped to receive to supplement the essentially anecdotal information, which was furnished to us, is not available. Nonetheless, the Postal Service has compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension.

The factual record includes the comments received in response to the October 10 and June 17 notices. Information was also obtained in response to the Federal Register notice of March 21, which reprinted and addressed generally a letter, dated March 14, 1986, sent to commenters who responded to the October 10 notice, soliciting further information for the record. The transcript of the public meeting held May 22, 1986 is also part of the record.

The comments came primarily from American commercial enterprises, including financial institutions and publishers, that use the services of international remailers in conducting their business abroad. The comments were almost universally consistent in their observations regarding the level of service provided by remailers. Specifically, the comments asserted that remailing was faster than U.S. airmail and that this time savings is often critical to the ability of American businesses to compete in foreign markets. Moreover, the comments asserted that remailing services were provided for a lesser cost than U.S. airmail, thereby also enhancing the ability of American firms to compete abroad. Although the Postal Service did not receive across-the-board data on the level of service provided by remailers, many commenters did provide information, testimonial in nature, indicating that their use of remail services has resulted in time and cost savings. Numerous commenters noted that this time and cost differential was

critical in order for letter matter being sent abroad to retain its commercial value. Several commenters also stated that, without faster and cheaper services provided by remailers, it would not be feasible for their businesses to compete in the international markets. The Postal Service found it significant that the comments received in response to the October 10 notice, which proposed language to make clear that remailing is not authorized under the suspension for extremely urgent letters, were overwhelming in their support of remailing. The Department of Commerce informed us that international remailing is of benefit to American businesses in foreign markets, a position also reflected in comments from the Department of Justice and the Office of Management and Budget.

#### Content of the Suspension

The new suspension, which is codified as § 320.8 of title 39, Code of Federal Regulations, suspends, in § 320.8 operation of the Statutes:

to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside of the United States.

The proposal also makes explicit in proposed § 320.8(b) that the suspension does not authorize the remailing of letters for delivery within the United States:

This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

A third provision, in § 320.8(c), generally authorizes the Postal Service, after notice and hearing, to revoke the suspension for a period of one year, as to a particular shipper or carrier operating in violation of the suspension. This provision also provides that a shipper or carrier's failure to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service would, for the purpose of proceedings under this subsection, create a presumption of a violation. This has the effect of shifting the burden of demonstrating compliance to the shipper or carrier, who would have access to

relevant information which its failure to cooperate has denied to the Postal Service.

In view of the considerations discussed above, 39 CFR Part 320 is amended as follows:

#### (List of Subjects in 39 CFR Part 320)

Postal Service, Computer technology, Advertising.

#### PART 320—SUSPENSION OF THE PRIVATE EXPRESS STATUTES

1. The authority citation for Part 320 is revised to read as set forth below, and the authority citations following all the sections in Part 320 are removed.

Authority: 39 U.S.C. 401, 404, 601-606; 18 U.S.C. 1693-1699.

2. A new § 320.8 is added to read as follows:

#### § 320.8 Suspension for international remailing.

(a) The operation of 39 U.S.C. 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

*Example (1)* The letters to overseas customers of commercial firm A in Chicago are carried by Carrier B to New York where they are delivered to Carrier C for carriage to Europe. Carrier C holds the letters in its distribution center overnight, then sorts them by country of destination and merges them with letters of other firms to those countries before starting the carriage to Europe in the morning. The carriage of firm A's letters is not interrupted. The suspension for international remailing applies to the carriage by Carrier B and by Carrier C.

*Example (2)* The bills addressed to foreign customers of the Chicago branch office of commercial firm D are carried by Carrier E to New York where they are delivered to the accounting department of firm D's home office. The accounting department uses the information in the bills to prepare its reports of accounts receivable. The bills are then returned to Carrier E which carries them directly to

Europe where they are entered into the mails of a foreign country. The carriage of the bills from Chicago to Europe is interrupted in New York by the delivery to firm D's home office. The suspension for international remailing does not apply to the carriage from Chicago to New York. It does apply to the subsequent carriage from New York to Europe.

(b) This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

*Example (1)* A number of promotional letters originated by firm F in Los Angeles are carried by Carrier G to Europe for deposit in the mails of a foreign country. Some of the letters are addressed to persons in Europe, some to persons in the United States. The suspension for international remailing does not apply to the letters addressed to persons in the United States.

(c) Violation by a shipper or carrier of the terms of this suspension is grounds for administrative revocation of the suspension as to such shipper or carrier for a period of one year in a proceeding instituted by the General Counsel in accordance with Part 959 of this chapter. The failure of a shipper or carrier to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service for the purpose of determining compliance with the terms of this suspension shall be deemed to create a presumption of a violation for the purpose of this paragraph (c) and shall shift to the shipper or carrier the burden of establishing the fact of compliance. Revocation of this suspension as to a shipper or carrier shall in no way limit other actions as to such shipper or carrier to enforce the Private Express Statutes by administrative proceedings for collection of postage (see § 310.5) or by civil or criminal proceedings.

**Fred Eggleston,**

*Assistant General Counsel, Legislative Division.*

(FR Doc. 86-18752 Filed 8-19-86; 8:45 am)

BILLING CODE 7710-12-M

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION, AFL-CIO

1300 L Street, N.W.

Washington, D.C. 20005

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

100 Indiana Avenue, N.W.

Washington, D.C. 20001,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE

475 L'Enfant Plaza

Washington, D.C. 20260,

Defendant,

and

AIR COURIER CONFERENCE OF AMERICA

2011 Eye Street, N.W.

Washington, D.C. 20006,

Intervenor.

Civil Action No. 87-3199

Judge Charles R. Richey

**ORDER**

HAVING CONSIDERED the Air Courier Conference of America's (ACCA) motion to intervene, memorandum of points and authorities in support thereof, the responses of plaintiff and defendant thereto, and the entire record herein and it appearing to the Court that the motion should be granted, it is this 26 day of February, 1988;

ORDERED that ACCA's motion to intervene be and is hereby granted pursuant to Rule 24(b).

United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA  
AMERICAN POSTAL WORKERS UNION, AFL-CIO,  
and NATIONAL ASSOCIATION OF LETTER  
CARRIERS, AFL-CIO,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,  
Defendant.

Civil Action No. 87-3199

APPEARANCES

*Plaintiffs:* For the American Postal Workers Union, AFL-CIO, Anton G. Hajjar, O'Donnell, Schwartz & Anderson, Washington, D.C. For the National Association of Letter Carriers, AFL-CIO, Richard N. Gilberg, Sophia E. Davis, Cohen, Weiss and Simon, New York, New York.

*Defendant:* Jay B. Stephens, United States Attorney, John D. Bates and Wilma A. Lewis, Assistant United States Attorneys; of counsel, Charles D. Hawley, Catherine V. Pagano, Law Department, United States Postal Service.

OPINION OF CHARLES R. RICHEY  
UNITED STATES DISTRICT JUDGE

INTRODUCTION

The United States Postal Service (the "Service") enjoys a statutory monopoly over the delivery of mail in and from the United States. This monopoly, as the Supreme Court recently noted, "has prevailed in this country since the Articles of Confederation," and is intended to ensure "prompt, reliable, and efficient services to [postal] patrons in all areas." *Univ. of California v. Public Employment Rela-*

*tions Bd.*, 108 S. Ct. 1404, 1408 (1988)(quoting 39 U.S.C. § 101(a)). The monopoly is embodied in the Private Express Statutes (the "PES"). 18 U.S.C. §§ 1693-1699; 39 U.S.C. §§ 601-606. The monopoly serves its purpose by ensuring that the revenues available to the Service are not endangered by private competition in less costly, and thus more profitable, segments of the mail delivery market.

Although Congress has granted the Service a complete monopoly in the PES, Congress has also granted the Service the power to suspend that monopoly in certain situations. Under 39 U.S.C. § 601(b), the Service "may suspend the operation of any part of [the PES] upon any mail route where the public interest requires the suspension." This lawsuit concerns the Service's decision to voluntarily suspend its monopoly under the PES with respect to that part of the mail-delivery market known as "international remailing." The regulation which suspended the Service's monopoly effectively defines "international remailing" by its description of what is permitted: the regulation "permits the uninterrupted carriage [by private entities] of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside of the United States." 39 C.F.R. § 320.8. The Service issued the regulation on August 20, 1986.

The plaintiffs, the American Postal Workers Union and the National Association of Letter Carriers (hereinafter the "Unions"), filed this suit on November 25, 1987.<sup>1</sup> They allege that the Service's decision to permit private international remailing violated the APA in two respects. First, they claim that the decision was arbitrary, capricious and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A). Second (and not so differently) they claim that the decision was in excess of the statutory authority granted the Service under 39 U.S.C. § 601(b), and therefore in violation of 5 U.S.C. § 706(2)(B). In a nutshell, the Unions contend that the Service applied the wrong legal standard in deciding to suspend international remailing monopoly.

<sup>1</sup> According to the Unions' complaint, the American Postal Workers Union represents approximately 250,000 Service employees "in the clerk, maintenance, special delivery messenger, and motor vehicle service crafts nationwide." Comp. at ¶ 4. The National Association of Letter Carriers represents approximately 220,000 Service employees "in the city letter carrier craft nationwide." Comp. at ¶ 5.

They further contend that the Service failed to develop an adequate record upon which to base its decision, and that it drew incorrect inferences from the record that did exist. The Service has met the Unions' contentions on the merits, and has argued in addition that the Unions lack standing to challenge its decision.

The matter came before the Court on the parties' cross-motions for summary judgment. On October 17, 1988, the Court granted judgment in favor of the Service. As further explained herein, the Court concluded that the Unions do not enjoy standing to challenge the Service's decision in this matter, and further, that the Service's decision did not violate the APA.

## DISCUSSION

### 1. Standing

The Service contends that the Unions lack standing because they have not been able to show an actual or threatened injury to their membership, and because they are not within the "zone of interests" that the PES are designed to protect. This Court disagrees that the Unions have not shown a sufficient actual or threatened injury, but agrees with the Service that the Unions are not within the "zone of interest" that the PES are designed to protect.

An essential element of standing in an Article III court, whether suit has been brought to review agency action or otherwise, is that the plaintiff must be capable of showing actual or threatened injury. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Service contends that the Unions have made no such showing here, in that they have offered no proof that their respective memberships have lost jobs or been expressly threatened with the loss of jobs.

The Service is correct; the Unions have made no such showing. However, the Unions have not attempted to make such a showing. Instead, the Unions allege that the decision to permit private international remailing, with its attendant loss of revenue to the Service, inflicts harm upon its membership through the loss of "employment opportunities." Compl. at ¶ 16. The Unions reason that, even if no jobs are directly lost, the relinquishment of international remailing to the

private sector reduces the current membership's opportunity to engage in international remailing, and thereby reduces the membership's opportunity to obtain "work time, overtime, employment opportunities, future benefits and . . . morale." Pl. Mem. at 8 (*quoting National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America*, 470 F.2d 265, 270 (10th Cir. 1972)).

The Court agrees with the Unions that the reasonable prospect of reduced employment opportunities, even if no specific loss currently can be shown, satisfies the "threatened injury" requirement of standing. There is authority from the Tenth Circuit for this finding in a context virtually identical to that presented here. *See American Postal Workers Union, AFL-CIO v. React Postal Services*, 771 F.2d 1375, 1380 (10th Cir. 1985) (whenever private entity permitted to perform postal functions contrary to the PES, the "employment opportunities of the postal workers are inevitably reduced"); *National Association of Letter Carriers, AFL-CIO, supra*, 470 F.2d at 270 (injury in fact due to "significant" loss of employment opportunity where PES not complied with). This conclusion is further consistent with authority in this Circuit arising in slightly different contexts. *See, e.g., Intern'l Union of Bricklayers v. Meese*, 761 F.2d 798, 802 (D.C. Cir. 1985) (union had standing because guidelines allowing aliens to enter workforce would interfere with jobs which "would otherwise likely go to union members"); *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984) (alleged loss of "employment opportunity," though no loss of present jobs shown, sufficient to confer standing); *National Treasury Employees Union v. Horner*, 659 F. Supp. 8, 12 (D.D.C. 1986) (union had standing where agency action would permit outside competition with membership).

However, the Court disagrees with the Union on the question of whether the interests asserted here fail within the "zone of interest" implicated by the PES. In *Clarke v. Securities Indus. Ass'n*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 750 (1987), the Supreme Court expanded upon its prior holdings that, in addition to the constitutional requirement of injury in fact, a plaintiff seeking review of agency action under 5 U.S.C. § 702 must show that he or she falls within the "zone of interests" protected by the statute at issue. This additional requirement, termed a "gloss on the meaning of § 702," 107 S.Ct. at 758 n.16, serves as "a guide for deciding whether, in view of Congress' evident intent to make agency

action reviewable, a particular plaintiff should be heard to complain of a particular agency decision." 107 S.Ct. at 757. In situations such as this, where the plaintiff is not the object of the agency action, but instead complains of the indirect consequences of that action, the test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*

Here, the avowed interests of the Unions' respective memberships — the retention of employment opportunities — simply bear no reasonable relationship to the purposes of the PES. The PES monopoly was designed to ensure only that the Service maintains sufficient revenue to be able to provide efficient and effective mail delivery services to all aspects of the market. The Service retains the express authority to suspend that monopoly when the public interest requires such a suspension. There is simply no evidence that the PES was intended to provide, even indirectly, job security for Service employees, or that job security for Service employees furthers in any way the purposes of the PES. The interests asserted by the Unions simply bear no relation to the purposes and policies implicit in the PES — indeed, they might well diverge in certain situations<sup>2</sup> — and it is therefore reasonable to assume that Congress did not intend for Service employees to enjoy the right to review the Service's decisions with respect to the PES.

The Unions' position, in essence, fails to distinguish between the harm required to establish injury — essentially quantitative deter-

<sup>2</sup> The "interest" created by the PES is in maintaining sufficient revenue, by means of a monopoly, to permit the Service to serve the totality of the mail-delivery market in the United States. As Congress expressly recognized in 39 U.S.C. § 601(b), there may be situations in which the "interest" of the PES may be achieved *without* benefit of the monopoly. Yet, *anytime* private entities engage in mail delivery of virtually any type, the employment opportunities of Service employees will arguably be endangered. As a result, Service employees and their Unions will *always* have an incentive to challenge a suspension of the PES, without regard to the relationship between the suspension and the "public interest" as contemplated by § 601(b). Thus, even when the "interest" protected by the PES clearly and unequivocally favors a suspension, the Unions will nevertheless have an interest in challenging the suspension. In this respect, the "interests" of the Union and the "interest" created by the PES not only do not converge, but in certain circumstances clearly diverge.

mination — and the harm required to bring a plaintiff within the "zone of interest" test — essentially a qualitative determination. Alternatively, the distinction can be seen as one between a "zone of interest" and a "zone of consequence." Judge Wilkey's opinion in *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 144-45 (D.C. Cir. 1977), is helpful in this regard. There, Judge Wilkey excluded from the "zone of interest" of a provision of the Internal Revenue Code a person whose competitive position had been injured by the IRS's interpretation of the statute.<sup>3</sup> Judge Wilkey wrote, in an analysis that is quite apposite here:

Every decision by a government agency generates consequences and various forms of impact on a wide range of valid interests held by a diverse range of parties. There is no doubt that the decisions embodied in the challenged revenue rulings have had an impact on [appellant]. But the concepts of *consequence* and *impact* are not the proper guideposts to define the relevant zone of interests; reference to these concepts does not aid greatly in determining whether a protected interest exists, but rather serve as part of the vocabulary in defining the relationship between an alleged injury and an asserted interest.

Thus, *consequences* and *forms of impact* do play an important role in the law of standing; these concepts are relevant in determining whether there has been *injury in fact*. . . . We cannot define the zone of interests as being the equivalent in every case of the "zone of impact" or the "zone of consequences." To do so would establish a standing doctrine based solely on the existence of harm to a party.

(emphasis in original). See also *Leaf Tobacco Exporters Ass'n. Inc. v. Block*, 749 F.2d 1106, 1116 (4th Cir. 1984) ("[E]very executive action

<sup>3</sup> Although the *Tax Analysts* decision did not involve review of an agency decision, as did *Clarke*, it applied the "zone of interest" test first developed in *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150 (1970). In *Clarke*, however, the Supreme Court expressly reiterated and reaffirmed the strength of the test as first announced in *Data Processing*.

portends endless adverse impacts and infinite adverse ramifications. We decline to convert the zone of interests test to one that calibrates zones of impact or zones of consequence.”). Here, as in the above-cited decisions, while the Service’s decision may have an *impact* upon the employment opportunities of the Unions’ members, that impact is simply not of a type that falls within the zone of interests implicated by the PES, even taking into consideration the liberal teachings of *Clarke*.<sup>4</sup> The Union’s members therefore do not have standing under 5 U.S.C. § 702 to challenge the Service’s decision to suspend the Service’s monopoly over private remailing.

## 2. Violations of the Administrative Procedures Act

Even if the Unions had standing to challenge the Service’s decision, however, it is apparent from the record that their challenge would fail under the APA.

The Unions’ first contention, that the Service exceeded its statutory authority in suspending the monopoly, rests upon the claim that the language of 39 U.S.C. § 601(b) requires that the Service find something close to a compelling public need before it may suspend the monopoly in any segment of the mail delivery market. The Unions assert that the Service’s decision therefore violated 5 U.S.C. § 706 (2)(B), because the record upon which the Service based its decision did not reflect such a compelling public need.

Although it appears that no court has interpreted § 601(b) in this context, the Court is comfortable that the Service bears no such heightened burden in justifying its actions. The “public interest . . .

<sup>4</sup> Although the specifics of this situation clearly support the conclusion reached, the logic of the result is strengthened when one considers that a contrary holding would implicitly grant standing under § 702 to *any* agency employee whose job or employment opportunities were threatened as a result of an agency decision. At bottom, the Unions here seek standing because the Service’s decision will likely result in reduced revenue for the service, and, as a result, reduced employment opportunities for Service employees. Yet, agencies make decisions *every day* that affect the allocation of resources within and among agencies, and thus affect the job prospects of agency employees. It is unreasonable, at least in the consideration of this court, to assume that Congress intended to make § 702 available to any disgruntled agency employee.

requires” language that is at issue here also authorizes myriad forms of agency action throughout the United States Code. Yet, to this Court’s knowledge, it has never been construed to impose upon an agency the heightened standard that the Unions request here. Indeed, the opposite would appear to be true; the “public interest . . . requires” language appears to suggest substantial discretion in an agency to define the public interest in a given situation and to act accordingly. Rather than indicating Congress’ desire to cabin the Service’s discretion, the language of § 601(b) implies to this Court, based upon the operation of similar language elsewhere, a desire to vest the Service with substantial discretion. *See, e.g., F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 593-94 (1981) (“public interest” language deemed to grant agency broad discretion).

Here, the Service made an express finding that the public interest, as expressed in the responses to its notice of proposed rulemaking, favored the entry of private firms into the international remailing market. Although the Unions are entitled to quarrel, and do quarrel, with the Service’s conclusion that the record supports its decision, it appears that the Service applied the proper standard here, and therefore did not act in excess of its statutory authority under § 601(b).

The Unions’ second contention under the APA is that the Service’s decision was “arbitrary, capricious and an abuse of discretion,” and therefore in violation of 5 U.S.C. § 706(2)(A). The Unions contend, in essence, that the Service’s decision was not based upon adequate evidence that the public interest supports private international remail, and that the Service did not consider the proper factors regarding the revenue effects of its decision.

This Court disagrees. Under the Supreme Court’s articulation of the arbitrary and capricious analysis in *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), an agency need only “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”

Here, the administrative record indicates that the Service initially promulgated a rule designed to perpetuate the Service’s monopoly over international remailing. This initial position met with strong, nearly unanimous public opposition to a continuation of the monopoly over this segment of the market, including opposition from various

government officials.<sup>5</sup> In response to this strenuous opposition, the Service sought the public's reaction to a suspension of the monopoly and a transfer of international remailing to the private sector. The public reaction the second time around was somewhat limited; only twenty-five responses were received, but again, nearly all favored private international remailing. Based upon these responses, and conceding that the public input lacked to some extent the factual specificity the Service had hoped for,<sup>6</sup> the Service's issuing release stated as follows:

The comments were almost universally consistent in their observations regarding the level of service provided by [private] remailers. Specifically, the comments asserted that remailing was faster than U.S.

<sup>5</sup> The Service's proposal to *retain* the monopoly over international remailing, first published October 10, 1985, was opposed by, among others, James Miller, Director of the Office of Management and Budget, Beryl Sprinkel, Chairman of the Counsel of Economic Advisors, Malcolm Baldrige, Secretary of Commerce, Congressmen Mickey Leland, Frank Horton and Robert Garcia, members of the Subcommittee on Postal Operations and Services, and the Attorney General.

<sup>6</sup> In its issuing release, the Service specifically noted the objection that the Unions had raised at the notice and comment stage, and that they reiterate here — that the record lacks sufficient empirical data to justify the Service's conclusion that the public interest supports a suspension. In the release, however, the Service responded that "[i]t may well be . . . that, because of the diverse character of the remail industry and the relatively recent development of remailing, the comprehensive information we had hoped to receive to supplement the essentially anecdotal information, which was furnished to us, is not available. Nonetheless, the Postal Service has compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension." 51 Fed. Reg. at 29637. The Court regards the Service's response as adequate under the circumstances, and does not view the relative dearth of empirical data as undermining the Service's evaluation of the "public interest." See, e.g., *F.C.C. v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-14 (1978) (factual specificity not always required where "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency") (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961); *Nat'l Ass'n of Regulatory Utility Commissioners v. F.C.C.*, 737 F.2d 1095, 1140-41 (D.C. Cir. 1984) (absence of complete factual support not fatal to agency decision under arbitrary and capricious review; even though "an agency's decision is a difficult one, or that the decision rests on a set of evidentiary facts less desirable or complete than one which would exist in some regulatory utopia does not alter our role").

airmail and that this time savings is often critical to the ability of American businesses to compete in foreign markets. Moreover, the comments asserted that remailing services were provided for a lesser cost than U.S. airmail, thereby also enhancing the ability of American firms to compete abroad. Although the Postal Service did not receive across-the-board data on the level of service provided by remailers many commenters did provide information, testimonial in nature; indicating that their use of remail services has resulted in time and cost savings. Numerous commenters noted that this time and cost differential was critical in order for letter matter being sent abroad to retain its commercial value. Several commenters also stated that without faster and cheaper services provided by remailers, it would not be feasible for their business to compete in the international markets. The Postal Service found it significant that the comments received in response to the October 10 notice, which proposed language to make clear that [the monopoly applies to international remailing], were overwhelming in their support of remailing. The Department of Commerce informed us that international remailing is of benefit to American businesses in foreign markets, a position also reflected in comments from the Department of Justice and the Office of Management and Budget.

51 Fed. Reg. at 29637. The Service's explanation of its decision and the bases therefore, while perhaps lacking the factual specificity that might exist in a "regulatory utopia," can hardly be regarded as arbitrary, capricious and an abuse of discretion. Section 601(b) expressly entrusted the Service with the task of deciding whether the public interest supports a continued monopoly over international remailing, and this Court simply cannot conclude, on the record before it, that the Service carried out its task in a manner that would justify judicial intervention. The Service has identified the factors supporting its decision, drawn rational inferences where detailed facts did not exist, and drawn a rational connection between the facts found and the decision made. The APA requires no more.

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Because the Service's decision was not in excess of statutory authority, and was not arbitrary, capricious and an abuse of discretion, the Service would be entitled to judgment as a matter of law even if the Unions had standing to bring this action.

Date: December 20, 1988

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Charles R. Richey  
United States District Judge

No. 89-1416

Supreme Court, U.S.

FILED

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

AIR COURIER CONFERENCE OF AMERICA,  
*Petitioner,*

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, and  
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

BRIEF OF AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, AND  
NATIONAL ASSOCIATION OF LETTER CARRIERS,  
AFL-CIO IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the respondent unions had standing to bring a civil action seeking judicial review of the final rule promulgated by the United States Postal Service suspending the Private Express Statutes so as to permit the practice of international remailing.

2. Whether the court of appeals correctly held that the Postal Service's final rule suspending the Private Express Statutes for international remailing pursuant to 39 U.S.C. § 601(b) was arbitrary and capricious because the Postal Service failed to consider the impact of the suspension on all postal patrons and failed to explain its reasons for rejecting several more narrowly defined suspension alternatives.

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AFL-CIO IN OPPOSITION

## OPINIONS BELOW

The opinion of the court of appeals is reported at 891 F.2d 304 (D.C. Cir. 1989). Pet. App. 1a-18a. The district court's opinion is reported at 701 F. Supp. 880 (D.D.C. 1988). Pet. App. 28a-38a.

STATEMENT OF THE CASE<sup>1</sup>

On August 20, 1986, defendant-appellee United States Postal Service ("Postal Service" or "USPS") published

<sup>1</sup> The petitioner, Air Courier Conference of America, intervened in the district court but did not participate in any part of the proceedings in the court of appeals. The petitioner filed a notice of

a final regulation suspending the Private Express Statutes, 18 U.S.C. §§ 1693-1699, 1729 (1982); 39 U.S.C. §§ 601-606 (1982) ("PES") which establish the postal monopoly, to permit a practice known as international remailing.<sup>2</sup> 39 C.F.R. § 320.8 (1986), Pet. App. 19a-26a, 51 Fed. Reg. 29,636. The new international remail regulation permitted for the first time private carriers to deliver mail originating in the United States directly to foreign postal systems, by-passing the Postal Service. On November 25, 1987, plaintiffs-appellants, American Postal Workers Union, AFL-CIO ("APWU") and National Association of Letter Carriers, AFL-CIO ("NALC") brought this action for declaratory and injunctive relief against the international remail regulation. APWU and NALC are national labor organizations representing more than 600,000 Postal Service employees whose employment opportunities would be adversely affected by the diversion of mail and revenue to private couriers that would be permitted by the regulation. The crux of the Unions' position was that the Postal Service had failed to develop an administrative record establishing that "the public interest requires" a suspension of the Private Express Statutes for international remail as mandated by 39 U.S.C. § 601(b).

The district court granted summary judgment in favor of the Postal Service, holding that the Unions lacked

appearance in the court of appeals on February 6, 1990, almost two months after the court entered its judgment. The petitioner asserts the right to seek certiorari as a "party" under Section 1254(1). The U.S. Postal Service did not petition for writ of certiorari.

<sup>2</sup> 39 C.F.R. § 320.8 provides in pertinent part:

(a) The operation of 39 U.S.C. § 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

standing to bring the action and, further, that the Postal Service had not acted arbitrarily and capriciously in suspending the Private Express Statutes. The court of appeals reversed the district court on both issues and remanded the case to the Postal Service for further development of the administrative record.

The PES generally reserve to the United States Postal Service a monopoly over the carriage of letters and packets. These statutes, origins of which date back at least to the Continental Congress, were enacted as a revenue protection measure for the Postal Service. 39 U.S.C. § 3623(d); *Regents of the University of California v. Public Employment Board*, 108 S.Ct. 1404, 1408, 1410 (1988). Under 39 U.S.C. § 601(b) the Postal Service may suspend the postal monopoly created by the Private Express Statutes only when "the public interest requires" the suspension. 39 U.S.C. § 601(b) (emphasis added). In determining whether the public interest requires such a suspension the service must follow the rule-making provisions of the Administrative Procedure Act. ("APA"). 5 U.S.C. § 101 *et seq.*; see 39 C.F.R. 310.7 (1975).

In October 1979, the Postal Service adopted a regulation pursuant to its authority under 39 U.S.C. § 601(b) suspending the operation of the Private Express Statutes for extremely urgent letters. 44 Fed. Reg. 61,181 (1979); 39 C.F.R. § 320.6 (1979). Sometime after the promulgation of the urgent letter suspension, private mail services began relying on the suspension to justify a business practice commonly known as "international remailing" in which private firms carry letters addressed to destinations outside the United States and deposit those letters in the mail stream of foreign postal administrations. Believing the practice to be illegal, the Postal Service asked the Department of Justice to enjoin the practice. When the Justice Department refused, the Postal Service initiated a rulemaking proceeding in October 1985 to modify the urgent letter suspension to con-

firm that the suspension did not cover the practice of international remailing. 50 Fed. Reg. 41,462-64 (1985), Ad. Rec. 1.

The proposed rule-making was opposed by remailers and other members of the business community. Their comments, however, revealed that much of what was sent through private remailers was non-urgent materials such as catalogues, other sales literature and newsletters. Many of the comments merely expressed a preference for having a choice of service or argued that the postal monopoly is inconsistent with a policy of free competition. Other comments focused primarily on the lower cost of private international remail.

In March 1986, the Postal Service abruptly changed its position on international remailing. The Chairman of the Postal Service's Board of Governors, John R. McKean, announced the initiation of a new rule-making proceeding to consider whether the public interest required the suspension of the Private Express Statutes to allow international remailing. McKean's announcement was part of a notice published on March 21, 1986 in the Federal Register withdrawing the October, 1985 proposed rule and announcing that a new rule-making proceeding would be initiated "as soon as a factual record is fully developed." 51 Fed. Reg. 9853 (1986), Ad. Rec. at 90.

The Postal Service never developed such a factual record. In both the June 17, 1986 notice of proposed rule-making and the notice published on August 20, 1986 announcing a final rule suspending the Private Express Statutes to permit unrestricted private international remailing, the Postal Service acknowledged the lack of factual information in the record. In its notice of proposed rule-making, the Postal Service emphasized the lack of evidence in the record citing the "anecdotal character" of tables charting relative delivery times, the "imprecision of the data" on the need for private international

remail, and the presence of "little or no reliable information as to the amount of revenues diverted to date by the activities of remailers." 51 Fed. Reg. 21,931 (June 17, 1986). As the court of appeals subsequently found:

the USPS had emphasized the sketchy nature of the factual record, referring to the 'anecdotal character' of tables charting relative delivery times, the 'imprecision of the data' on the need of U.S. businesses for private international remailing, and the presence of 'little or no reliable information as to the amount of revenues diverted to date by the activities of remailers.' 51 Fed. Reg. 21,931 (June 17, 1986).

Pet. App. 4a.

The NALC and the APWU filed suit in the district court challenging the international remail suspension. The district court granted the Postal Service's motion for summary judgment. The district court first found that the Unions lacked standing, even though they met the constitutional requirements for standing under Article III, because they were not within the "zone of interests" implicated by the PES. Pet. App. 32a. The district court also found that the regulation promulgated by the Postal Service was not in excess of statutory authority and was not arbitrary, capricious or an abuse of discretion in spite of the "relative dearth of empirical data" in the record. Pet. App. 35a.

In an opinion issued on December 8, 1989, the Court of Appeals for the District of Columbia Circuit reversed the district court on both standing and the merits and vacated summary judgment for the Postal Service. The court first found that the Unions clearly satisfied the "injury in fact" constitutional requirement for Article III standing based on the threatened injury of possible reduced employment opportunities for their members. The court also found that the Unions satisfied the "zone of interest" test for standing as enunciated by this Court in *Clarke v. Securities Industry Ass'n*, 107 S.Ct. 750, 757-759

(1987) (*Clarke*). With respect to the merits, the court of appeals found that the Postal Service did not consider the impact of the proposed suspension "on those consumers who would continue to use the Postal Service, both from a price and service perspective." Pet. App. 14a. Instead, the Postal Service considered only the "selective cost savings and service benefits" to businesses engaged in commerce overseas. Pet. App. 14a. The court concluded that this failure "to give sufficient attention to how revenue losses might affect cost and service of other postal patrons" was unreasonable, arbitrary and capricious in light of the fundamental purpose of the PES "to prevent private competitors from 'cream skimming' profitable routes, thereby providing the Postal Service with sufficient revenue to fulfill its mandate of providing service throughout the nation and at uniform rates." Pet. App. 14a-15a. The court also found that the Postal Service acted arbitrarily and capriciously by failing to explain its reasons for rejecting more narrowly defined suspension alternatives. Pet. App. 15a.

The court remanded the case to the district to vacate the grant of summary judgment and allow the agency to reopen its proceedings if it so desired.

#### REASONS THE WRIT SHOULD BE DENIED

1. The court below correctly applied the zone of interest test enunciated by this Court in *Clarke*, 107 S.Ct. at 750, and nothing in the court of appeals' analysis or application of the test suggests a need for any further clarification by this Court. The zone of interest test grants standing to challenge an agency action to any party "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Id.* at 756. Since Congress intended agency action to be "presumptively reviewable" the test denies standing only to those parties whose "interests are so marginally related to or inconsistent with the purposes implicit in the stat-

ute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 757.

The court below correctly found that the Unions' interest in ensuring a sufficient revenue base for the Postal Service in order to preserve employment opportunities for their members was more than "marginally" related to the purposes of the PES. In reaching these conclusions, the court quite properly did not view the PES in isolation. Rather, as required by *Clarke*, the court examined 39 U.S.C. § 601 in the context of the entire Postal Reorganization Act of 1970, 39 U.S.C. §§ 101-5605 ("PRA"), of which section 601 is a part. Recognizing that one of the principal purposes of the PRA was the improvement of wages and working conditions and the reform of postal labor relations, the court correctly found that "[t]he Unions' asserted interest is embraced directly by the labor reform provisions of the PRA." Pet. App. 8a. In addition, even if one focuses only on the revenue protective purposes of the PES, the court stated: "That postal workers benefit from the PES's function in ensuring a sufficient revenue base . . . is scarcely deniable." *Id.*

Given the generous test of standing in *Clarke*—specifically, this Court's teaching that, for an injured party to be deprived of standing under the "zone of interest" test, a court must find a congressional purpose to *preclude* judicial review by these plaintiffs (107 S.Ct. at 759)—the court of appeals was clearly correct in holding that the respondents had standing to challenge this regulation.

2. Contrary to the allegations of the petitioner (Pet. App. at 8-9), there is no conflict among the circuits on the issue of postal unions' standing to seek judicial review of a regulation suspending the PES. The cases cited—*National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America, Inc.*, 470

F.2d 265 (10th Cir. 1972); *American Postal Workers Union v. React Postal Services, Inc.*, 771 F.2d 1375 (10th Cir. 1985); and *American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal System of America, Inc.*, 481 F.2d 90 (6th Cir.), cert. granted, 414 U.S. 1110 (1973), cert. dismissed, 415 U.S. 901 (1974)<sup>3</sup>—involved the very different question whether the postal unions have an implied private right of action under the PES against private couriers. This issue is resolved by the much more demanding test of whether Congress affirmatively intended to allow a direct civil action to enforce the statute in question. See *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 770 (1981); *Cort v. Ash*, 422 U.S. 66 (1975).

None of these cases cited by petitioner suggests that postal unions have no standing to seek judicial review of Postal Service regulations suspending the PES under the approach set out in *Clarke*.

3. The court of appeals' decision on the merits does not raise "an important issue of administrative law and procedure" as petitioner has claimed. The court simply reviewed the record relied on by the Postal Service and found that: 1) the Postal Service failed to consider seriously the impact of the proposed suspension on all Postal Service patrons; and 2) the Postal Service failed to explain why it rejected more narrowly defined suspension alternatives. Pet. App. 16a. In concluding that these omissions rendered the suspension arbitrary and capricious, the court relied upon the proposition that under 39 U.S.C. § 601 the Postal Service must consider the effect of revenue losses resulting from a proposed suspension on the overall mail-using public and the Postal Service's ability to fulfill its statutory mandate of uni-

<sup>3</sup> In the *Detroit Local* case, this Court at first issued a writ of certiorari to resolve the circuit conflict on whether there exists a private right of action under the PES. The writ was dismissed on motion of the petitioner.

versal service at uniform rates. Since this proposition is manifestly correct, see *California Regents*, 108 S.Ct. at 1408 and 1410, the only real issue presented by this case is whether the court below correctly evaluated the administrative record. This limited question does not merit review by this Court.<sup>4</sup>

## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

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Dated: May 9, 1990

<sup>4</sup> The petitioners' disagreement with the policies underlying the postal monopoly as being contrary to free competition should be addressed to Congress, not to the Court.

**In the Supreme Court of the United States**  
OCTOBER TERM, 1989

---

**AIR COURIER CONFERENCE OF AMERICA, PETITIONER**

*v.*

**AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, ET AL.**

---

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**BRIEF FOR THE FEDERAL RESPONDENT  
IN OPPOSITION**

---

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## **QUESTIONS PRESENTED**

1. Whether employees of the United States Postal Service, through their unions, have standing under the "zone of interests" test to challenge a Postal Service regulation permitting private mail services to engage in international remailing.

2. Whether the Postal Service acted arbitrarily and capriciously in promulgating its international remailing regulation.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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No. 89-1416

AIR COURIER CONFERENCE OF AMERICA, PETITIONER

*v.*

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR THE FEDERAL RESPONDENT  
IN OPPOSITION**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 891 F.2d 304. The opinion of the district court (Pet. App. 28a-38a) is reported at 701 F. Supp. 880.

**JURISDICTION**

The judgment of the court of appeals was entered on December 8, 1989. The petition for a writ of certiorari was filed on March 8, 1990. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. The United States Postal Service has since the days of the Articles of Confederation exercised a statutory monopoly over the carriage of mail in and from the United States. This monopoly is intended to ensure uniform rates and "prompt, reliable, and efficient services to [postal] patrons in all areas" of the country. *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988) (emphasis omitted) (quoting 39 U.S.C. 101(a)). The statutes setting forth this monopoly are known as the Private Express Statutes (PES), 18 U.S.C. 1693-1699, 1729, and 39 U.S.C. 601-606. At issue in this case is a provision of the PES that authorizes the Postal Service to suspend its monopoly "upon any mail route where the public interest requires the suspension." 39 U.S.C. 601(b).

Acting under its authority to suspend the monopoly conferred by the PES, the Postal Service in 1979 authorized private mail services to provide "extremely urgent letters," more commonly known as express mail or overnight delivery service. See 44 Fed. Reg. 61,178 (1979). Various private mail services interpreted this authority to permit a practice called "international remailing," whereby a private service carries mail to a foreign country and then deposits it in a foreign mail system for final delivery. The Postal Service initially proposed to prohibit this application of the urgent letter authority. See 50 Fed. Reg. 41,462 (1985). However, the business community and members of Congress and the Executive Branch urged the Service to reconsider its position, arguing that international remailing enhances the competitive position of American companies abroad.

The Postal Service agreed to reconsider its position, and instituted a rulemaking designed "to remove the cloud" over the validity of international remailing services. See 51 Fed. Reg. 29,636 (1986); 39 C.F.R. 320.8. Although the comments received by the Postal Service in the rulemaking concerning the economics of international remailing were not as precise and detailed as it had hoped, the Service nevertheless concluded that it had "compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension." 51 Fed. Reg. 29,637 (1986); Pet. App. 23a. The Postal Service therefore issued a final rule suspending the operation of the PES to international remailing services.

2. Two postal worker unions brought this action in district court, challenging the international remailing regulation on the ground that the rulemaking record was inadequate to support a finding that the suspension of the PES for international remailing was in the "public interest." The complaint alleged that the unions' claims arose under the Private Express Statutes and regulations, the Declaratory Judgment Act, 28 U.S.C. 2201, and the mandamus statute, 28 U.S.C. 1361. Compl. 1 (dated Nov. 16, 1987). It did not allege that their claims arose under the Administrative Procedure Act (APA), 5 U.S.C. 701-706. See Compl. 1.

The district court dismissed the union's complaint on two grounds. The court first held that while the postal workers' interest in job security was sufficient to confer Article III standing, the unions did not satisfy prudential standing limitations. Specifically, the court held that the unions' interest in preserving employment opportunities with the Postal Service did not fall within the "zone of interests" protected by

the Private Express Statutes. Pet. App. 30a-34a. Second, the district court ruled that even if the unions' complaint were to be considered on the merits, the Postal Service's decision was not arbitrary and capricious, and was based on an adequate rulemaking record. *Id.* at 34a-38a.

3. The court of appeals reversed. It held that the unions satisfied the zone of interests requirement for APA review under *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), and that the Postal Service's regulation was arbitrary and capricious, because the Service relied on too narrow an interpretation of "the public interest."

On the standing question, the court noted (Pet. App. 4a) that "[a]lthough the USPS is exempt from the strictures of the Administrative Procedure Act ('APA'), see 39 U.S.C. § 410(a), it has chosen to follow APA procedures when promulgating rules affecting the PES. See 39 CFR § 310.7 (1988)." The court therefore concluded that Section 702 of the APA, 5 U.S.C. 702, and the "zone of interests" test which this Court has recognized as "a gloss on § 702 of the APA," Pet. App. 6a, applied to this case.

In determining that the interest in employment opportunities asserted by the postal unions fell within the zone of interests protected by the PES, the court observed that the PES were reenacted as part of the Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719. A "key impetus" and "principal purpose" of the PRA, in turn, was "to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees." Pet. App. 8a. Reasoning that "[t]he Unions' asserted interest is embraced directly by the labor reform provisions of the PRA" and that

"[t]he PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service," the court concluded that "[t]he interplay between the PES and the entire PRA persuades us that there is an 'arguable' or 'plausible' relationship between the purposes of the PES and the interests of the Unions [*sic*]." *Id.* at 8a-9a. The court also held that "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities," because "postal workers benefit from the PES's function in ensuring a sufficient revenue base" for the Postal Service's activities. *Id.* at 9a.

On the merits, the court of appeals held that the Postal Service had considered only the cost savings and service benefits to the international business sector from the suspension of the PES in favor of private international remailing, and had not adequately considered the effect of the regulation "on those [other] consumers who would continue to use the Postal Service, both from a price and service perspective." Pet. App. 14a. The court therefore remanded the case to the Postal Service for it to reconsider the issue. *Id.* at 16a.

#### ARGUMENT

1. Petitioner primarily renews its contention that the postal unions have not advanced a claim within the "zone of interests" protected by the PES. Although our brief in the court of appeals assumed that the "zone of interests" test applies in this case, on further review of the record we have concluded that this question is not presented. Because this alternative ground for dismissal was not previously raised in this litigation, and because the court of appeals'

decision does not conflict with any other post-*Clarke* decision construing the “zone of interests” test, review by this Court is not warranted.<sup>1</sup>

The parties and the courts below erroneously analyzed this case under the principles for judicial review under the APA, 5 U.S.C. 701-706. The court of appeals’ discussion of the “zone of interests” standing question was premised on its understanding, Pet. App. 6a, that “[t]he Unions’ cause of action derives from § 702 of the APA, which grants standing to a person ‘aggrieved by agency action within the meaning of the relevant statute.’ 5 U.S.C. § 702 (1982).” That understanding, however, is clearly wrong both as a factual and as a legal matter.

The unions did not in fact invoke the APA as a basis for their claim. See Compl. 1. Rather, their complaint sought relief directly under the PES and implementing regulations, under the Declaratory Judgment Act, 28 U.S.C. 2201, and under the mandamus statute, 28 U.S.C. 1361. Compl. 1.

The evident reason the unions did not seek relief under the APA is because the APA is not legally applicable to their complaint. Section 410(a) of Title 39 specifically provides (with exceptions not relevant here) that “no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, *including the provisions of chapters 5 and 7 of title 5*, shall apply to the exercise of the powers of the Postal Service” (emphasis added). Chapters 5 and 7 of Title 5 are the provisions of the APA dealing with “Administrative Pro-

<sup>1</sup> The United States Postal Service is a respondent pursuant to Rule 12.4 of the rules of this Court. Petitioner, an intervenor below, appears to be a proper petitioner. See *Bryant v. Yellen*, 447 U.S. 352 (1980).

cedure” (Chapter 5) and “Judicial Review” (Chapter 7). Thus, 39 U.S.C. 410(a), by its terms, expressly “preclude[s] judicial review” under the APA, 5 U.S.C. 701(a)(1).

Because the judicial review provisions of the APA do not apply here, and because the unions have cited no other law expressly authorizing them to seek APA judicial review,<sup>2</sup> the court of appeals erred in relying on the “zone of interests” test to evaluate their standing. As this Court noted in *Clarke v. Securities Indus. Ass’n*, 479 U.S. at 400-401 n.16, the “generous” zone of interests test is “most usefully understood as a gloss on the meaning of § 702 [of the APA],” not as a general prudential standing standard that applies whatever the cause of action.

The court of appeals recognized that the Postal Service is exempt from the provisions of the APA. Pet. App. 4a. It nevertheless observed, *ibid.*, that the Postal Service has provided by regulation that “[a]mendments of the regulations [such as the one at issue here] may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.” 39 C.F.R. 310.7. This provision, however, at most may be read to mean that the Postal Service has subjected itself to the provisions of *Chapter 5* of the APA that set forth the procedures to be employed by an agency when it conducts a rulemaking. See 5 U.S.C. 553. The court cited no regulation or other statement by the Postal Service agreeing to subject itself to the judicial review provisions of *Chapter 7*.

<sup>2</sup> In fact, given that Chapter 7 of the APA does not apply, the unions have identified no applicable waiver of sovereign immunity, see 5 U.S.C. 702, 704, or any applicable cause of action, see 5 U.S.C. 702.

Although the foregoing objections to the availability of judicial review under the APA are by their nature jurisdictional, see *Block v. Community Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984), they were not presented below and have not been developed in this or other litigation. Accordingly, they do not warrant review by the Court at this time.

In any event, even if the issue of APA standing were properly presented in this case, it would not warrant this Court's consideration. Petitioner asserts that the decision below conflicts with a decision of the Sixth Circuit denying standing to postal unions under analogous circumstances. *American Postal Workers Union, Detroit Local v. Independent Postal System of America, Inc.*, 481 F.2d 90 (1973), cert. dismissed, 415 U.S. 901 (1974). However, that case (like this one) was not brought under the APA, see 481 F.2d at 92, and pre-dates this Court's recognition in *Clarke* that the "zone of interests" test is a construction of the APA. Thus, the Sixth Circuit's decision—and the other cases cited by petitioner that pre-date *Clarke* (Pet. 8-9)—are not reliable indicators of how those courts would rule on the zone of interests standing issue if it were presented to them today. Any further consideration of the meaning of the "zone of interests" standard should await such time as the lower courts have more fully considered this Court's decision in *Clarke*.

2. Petitioner's contention that the court of appeals misinterpreted the "public interest" standard for suspension of the PES, 39 U.S.C. 601(b), also does not warrant review. Even if, in the jurisdictional posture of this case, the question could be reached, petitioner cites, Pet. 17-18, no conflicting appellate decisions, and argues only that the court of appeals failed to show proper deference to the agency's in-

terpretation of the statute. The Postal Service did not file a petition for certiorari in this case, however, and the court of appeals' decision does not rule out the possibility that on remand the Postal Service could justify the same or a similar rule after giving further consideration to the factors suggested in the court of appeals' opinion. Given the interlocutory posture of the case, there is no need to consider the question at this time.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1990

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\* The Solicitor General is disqualified in this case.

4  
NO. 89-1416

Supreme Court, U.S.

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CLERK

IN THE  
**Supreme Court Of The United States**

October Term, 1989

**AIR COURIER CONFERENCE OF AMERICA,**  
*Petitioner,*

v.

**AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, et al.,**  
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

**PETITIONER'S REPLY TO FEDERAL  
RESPONDENT'S OPPOSITION**

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May 23, 1990

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IN THE  
**Supreme Court Of The United States**

October Term, 1989

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**AIR COURIER CONFERENCE OF AMERICA,**  
*Petitioner,*

**AMERICAN POSTAL WORKERS UNION,**  
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*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

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**PETITIONER'S REPLY TO FEDERAL  
RESPONDENT'S OPPOSITION**

The Acting Solicitor General, on behalf of the federal respondent United States Postal Service, acknowledges that the court of appeals erred in its determination that the Unions had standing to attack the remail rule, Federal Respondent's Opposition at 7-8 (F.R. Opp.) and agrees that the Air Courier Conference of America (ACCA)<sup>1</sup> is a proper petitioner, *id.* at 6, fn. 1. The Postal Service, nevertheless, opposes certiorari and contemplates remand to the Postal Service for further rulemaking

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<sup>1</sup> ACCA has no parent or subsidiary corporations.

proceedings, *id.* at 10, because the Postal Service erred in arguing, and the court of appeals erred in relying upon the "zone of interest" test of standing as articulated by the Court in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987). *Id.* at 8.

The thrust of the Postal Service's opposition is that: (1) this is not an APA case, because the complaint did not cite 5 U.S.C. § 702, *id.* at 7; (2) this cannot be an APA case, because (a) 39 U.S.C. § 410 (b) exempts the Postal Service from the APA and (b) because the Postal Service's adoption of APA rulemaking is, at most, a voluntary submission to chapter 5 rulemaking procedures, but not to chapter 7 judicial review, *id.*; and (3) that the Unions may never have properly invoked jurisdiction, because they cited no other sovereign immunity waiver statute, *id.* at 8-9, fn. 2. Accordingly, the Postal Service contends, the court of appeals erred in relying upon the *Clarke* test for its analysis of the zone of interest test of standing because *Clarke*, as an APA case, is not applicable.

ACCA agrees with the Acting Solicitor General's contention that the zone of interest test of standing applies in APA cases; that non-APA cases require something more; and the additional requirements of non-APA cases have never been briefed. The courts below assumed that § 702 was the basis for the complaint, because no other jurisdictional basis was ever articulated and the federal respondent so assumed in its briefs. Thus, if the federal respondent is now correct that this is not and cannot be a § 702 case, but should have been brought under some other provision waiving sovereign immunity, say 39 U.S.C. § 409, ACCA agrees that the distinctions between standing under § 702 and standing under § 409 or some other provision have not been briefed. If this Court accepts the federal respondent's new position or believes it needs a new record on such further briefing, however, rather than denying certiorari, it should vacate the district court and court of appeals decisions and remand for further proceedings on that issue.

For the court simply to deny certiorari, without more, would implicitly uphold the court of appeals' decision; return the case for further rulemaking in accordance with that decision, in spite of its arguable jurisdictional deficiencies; and cause added confusion as to the zone of interest test, particularly in the context of the Private Express Statutes.

Nevertheless, ACCA believes that this case is appropriate for certiorari and ripe for review, because the zone of interest test is a necessary part of standing under both APA and non-APA cases. See *Clarke* fn. 16 at 400-401; *American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal System of America*, 481 F.2d 90 (6th Cir. 1973), *cert. dismissed*, 415 U.S. 901 (1974) (*APWU v. IPSA*).<sup>2</sup> The Postal Service has not argued, nor offered any authority for the notion, that the zone of interest test in APA cases is any different than the zone of interest prong of standing under non-APA cases. There is nothing in footnote 16 of *Clarke* that could be construed as specifically limiting its discussion of the test to § 702 cases. Thus, the clarification of the zone of interest test sought by ACCA's petition is of identical importance, whether or not this is a § 702 APA case or not.

Absent vacation of both decisions below, denial of certiorari would serve only to mislead the lower courts in their attempts to analyze the zone of interest of the postal monopoly laws in both APA and non-APA cases. In addition, ACCA

<sup>2</sup> The Postal Service attempts to distinguish *APWU v. IPSA*, *supra* on the grounds that it was not an APA case and predates *Clarke*. F.R. Opp. at 9. That the Sixth Circuit considered the zone of interest of the postal monopoly laws in a non-APA case hardly distinguishes that case from this one where the District of Columbia Circuit considered the zone of interest of the same law on a complaint that did not invoke the APA. Moreover, the fact that the Sixth Circuit's decision pre-dates *Clarke*, does not support any delay in this Court's clarification of the zone of interest test, particularly as it applies to the postal monopoly laws, given that the District of Columbia Circuit based its decision on an erroneous interpretation of *Clarke*.

would be forced to defend the remail rule in a remanded proceeding before the Postal Service ordered by a court that the federal respondent contends "clearly" lacked jurisdiction.

Respectfully submitted,

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No. 89-1416

Supreme Court, U.S.

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IN THE  
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v. *Petitioner,*  
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*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

MOTION OF RESPONDENTS  
AMERICAN POSTAL WORKERS UNION, AFL-CIO, AND  
NATIONAL ASSOCIATION OF LETTER CARRIERS,  
AFL-CIO, TO DISMISS THE WRIT FOR  
LACK OF JURISDICTION, AND BRIEF IN SUPPORT

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 89-1416

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AIR COURIER CONFERENCE OF AMERICA,  
*Petitioner,*

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

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**MOTION OF RESPONDENTS  
AMERICAN POSTAL WORKERS UNION, AFL-CIO, AND  
NATIONAL ASSOCIATION OF LETTER CARRIERS,  
AFL-CIO, TO DISMISS THE WRIT FOR  
LACK OF JURISDICTION, AND BRIEF IN SUPPORT**

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**INTRODUCTION**

Respondents American Postal Workers Union, AFL-CIO ("APWU") and National Association of Letter Carriers, AFL-CIO ("NALC"),<sup>1</sup> pursuant to Rule 21 of the Court, respectfully request the Court to dismiss the writ of certiorari for lack of jurisdiction, in particular, because petitioner Air Courier Conference of America ("ACCA") lacks standing to petition for the writ.

In *Diamond v. Charles*, 476 U.S. 54 (1986), the Court specifically held that where, as here, a defendant de-

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<sup>1</sup> These respondents are sometimes collectively referred to as "the Unions" or "Union respondents."

clines to seek review in this Court of an adverse decision of the court of appeals, a party which had intervened on the side of the defendant must independently establish his standing in this Court. ACCA, a trade association the members of which engage in the practice of international remailing, was permitted to intervene by the district court under Rule 24(b), F.R. Civ. P., in support of the defendant U.S. Postal Service's final rule suspending the Private Express Statutes ("PES")<sup>2</sup> for international remailing. However, as *Diamond* makes clear, because the Postal Service has not petitioned for a writ of certiorari, there is no longer a case or controversy over the validity of the final rule. Furthermore, ACCA has never demonstrated that its members "'personally [have] suffered some actual or threatened injury'" as required by *Diamond*, 476 U.S. at 62 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). Rather, ACCA has consistently taken the position that its members' activities did not violate the PES under pre-existing regulations. Moreover, the Department of Justice—which has the exclusive authority to prosecute violations of the PES—has assured ACCA members that they will not be prosecuted or be the subject of other court actions under existing regulations.<sup>3</sup> Accordingly, the Court is without jurisdiction in this case.

<sup>2</sup> The PES are found at 39 U.S.C. 601-606 and 18 U.S.C. 1693-1699, 1729. These statutory provisions collectively give the Postal Service the exclusive right to carry letters over postal routes, unless such carriage is permitted by a statutory exception, or unless the operation of the PES is suspended by the Postal Service pursuant to 39 U.S.C. 601(b).

<sup>3</sup> As ACCA stated in its petition: "Before the Postal Service proposed its 1985 anti-remail rule, it had sought Justice Department action against remailers. The Justice Department declined to prosecute." Pet. at 9.

## STATEMENT OF THE CASE

A statement of the case appears in the petition, as well as the joint opposition of the Union respondents and that of the Acting Solicitor General on behalf of the U.S. Postal Service. It will not be repeated here except insofar as it is necessary to explain this motion.

The issues presented to this Court by the petitioner involve both the validity of the final rule suspending the PES for so-called "international remailers" and the question whether respondent Unions' claims fell within the relevant "zone of interest," thus permitting them to seek judicial review of the final rule. The court of appeals accurately summarized the case as follows (Pet. App. 2a-4a):

In 1979, the Postal Service exercised its authority under § 601(b) to suspend the PES for the carriage of extremely urgent letters, otherwise known as express mail or overnight service. See 44 Fed. Reg. 61, 181 (Oct. 24, 1979). As a result, private mail services began to rely on the urgent letter suspension to support the practice of "international remailing," or carriage of letters overseas for deposit into foreign postal systems—thus allowing users of the service to bypass completely the U.S. Postal Service. In October of 1985, the USPS announced its intention to amend the urgent letter suspension to limit sharply its applicability to international remailing. See 50 Fed. Reg. 41,462 (October 10, 1985). This proposal was greeted with massive opposition from the business community and the disapproval of several members of Congress and senior executives in the Reagan Administration. Opponents argued primarily that preventing private remailers from offering inexpensive, speedy service would jeopardize the ability of American companies to compete for business abroad.

In March of 1986, the Chairman of the Postal Service's Board of Governors, John McKean, an-

nounced the USPS's intention to initiate another rulemaking proceeding "to remove the cloud that now hangs over the international remail services and preserve the benefits of desirable competition between the Postal Service and private companies." The USPS withdrew its earlier proposal and began considering whether to suspend the PES to allow international remailing. See 51 Fed. Reg. 9652 (March 21, 1986). Two rulemaking notices to this effect and a public meeting produced little additional factual information.

On August 20, 1986, the USPS published a final rule suspending the PES to permit unrestricted international remailing. See 51 Fed. Reg. 29,636. The regulation allows private carriers to deliver mail from the United States directly to foreign postal systems, bypassing the USPS, without meeting certain cost conditions that applied under the urgent letter suspension. See 39 CFR § 320.8 (1988). Responding to the Unions' complaint that the record was inadequate to support a "public interest" finding, the USPS stated:

The Postal Service . . . sought . . . to obtain precise and detailed information regarding the level of services provided by remailers, and the benefits which [their] customers . . . derive. It may well be, however, that because of the diverse character of the remail industry and the relatively recent development of remailing, the comprehensive information we had hoped to receive to supplement the essentially anecdotal information, which was furnished to us, is not available. Nonetheless, the Postal Service has compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension.

51 Fed. Reg. 29,637 (Aug. 20, 1986). Indeed, in its final notice of proposed rulemaking the USPS had emphasized the sketchy nature of the factual record, referring to the "anecdotal character" of tables

charting relative delivery times, the "imprecision of the data" on the need of U.S. business for private international remailing, and the presence of "little or no reliable information as to the amount of revenues diverted to date by the activities of remailers." 51 Fed. Reg. 21,931 (June 17, 1986).

The Unions filed suit in the district court, seeking declaratory and injunctive relief against enforcement of the international remailing regulation.

Petitioner ACCA was permitted to intervene in the district on the side of defendant U.S. Postal Service pursuant to Rule 24(b), F.R. Civ. P. (permissive intervention). Appendix ("App.") 1a. ACCA's interest was based on those of its members which engage in international remailing, some of which formed "an *ad hoc* group of certain interested ACCA members which drew financial support from ACCA." This group was known as the International Remail Committee in the rulemaking proceedings. Memorandum of Points and Authorities in Support of Air Courier Conference of America's Motion to Intervene, at 2; App. at 3a. ACCA alleged that its members would suffer "irreparable injury" if the rule were vacated. *Id.* at 1-2; App. 3a-4a. It contended that "[r]evocation of 39 C.F.R. § 320.8 [the international remail suspension] would present ACCA's members who engage [in] international remail of letters with the Hobson's choice of foregoing \$50 million in sales or face possible civil suits and criminal prosecution under the Private Express Statutes. . . ." *Id.* at 7; App. 7a. It argued that intervention was warranted because the Postal Service would not adequately defend the rule. *Id.* at 10; App. 9a.

ACCA did not participate in any part of the proceedings in the court of appeals. It filed a notice of appearance in that court on February 6, 1990, almost two

months after the court entered its judgment. U. Resp. Opp. at 1-2, n.1.<sup>4</sup>

The administrative record discloses that international remailers have contended that they may lawfully operate under the 1979 "extremely urgent letter" suspension of the PES. 39 CFR 320.6. That rule contains two tests for coverage: a "loss of value" test and a "cost" test. Under the loss of value test, the letter must be delivered within a short, specified period of time after dispatch and the value or usefulness of the letter must be greatly diminished if not delivered within that period. The cost test is satisfied if the amount paid for private carriage is at least \$3.00 or twice the applicable U.S. postage for First Class mail, whichever is the greater. The International Remail Committee stated in its comments to the USPS's initial proposal to amend the urgent letter rule that their businesses already met the "cost" and "loss of value" tests (Ad. Rec. at 32, p. 46):

International remail companies do charge more than twice what the Postal Service would charge for transporting shipments containing multiple envelopes. Much of the items carried are, indeed, demonstrably urgent. As indicated, the Department of Justice apparently agrees.

The December 12, 1985, comments filed by the Department of Justice during the rulemaking fairly summarize the arguable "loophole" in these regulations which was grasped by international remailers to enter this aspect of the courier business (Ad. Rec. at 28, pp. 5, 9-10 (footnotes omitted)):

American firms use remailers to send bulk mailings to foreign addresses. These bulk mailings typically involve such items as bank statements, periodicals, catalogues, and advertisements, but rarely in-

<sup>4</sup> Because it was a party in the district court, the Solicitor General believes that ACCA "appears to be a proper petitioner." Fed. Resp. Opp. at 6, n.1.

dividual correspondence. Generally, the remailer ships the mail to the foreign postal administration that offers the best combination of speed and price for delivery to the addressee. The postal administration in which the remailer deposits the mail is not necessarily that of the ultimate recipient.

\* \* \*

Under the "cost" test, Postal Service regulations allow carriers to make the comparison with Postal Service rates based on an entire shipment of letters if all the letters are "delivered" to the same destination:

If a single shipment consists of a number of letters that are picked up together and *delivered together to a single destination*, the applicable U.S. postage may be computed for purposes of this paragraph as though the shipment constituted a single letter of the weight of the shipment. (Emphasis added)

39 C.F.R. § 320.6(c). The definition of "delivered" is the crux of the ambiguity that has permitted remailers to flourish by using airmail shipments as "urgent" deliveries of arguable "non-urgent" individual letter items.

For purposes of the suspension of the Private Express Statutes for extremely urgent international mail, the regulations consider letters to be "delivered" when they are in the custody of the international or overseas carrier at its last scheduled point of departure from the 48 contiguous states." 39 C.F.R. § 320.6(b)(2). The remailers contend that under the current regulations, even though mail is ultimately destined for a number of different foreign addresses, it is deemed "delivered" when the bundle of consolidated letters arrives at the overseas carrier. Under that reading of the regulations, shipments so delivered meet the cost test if the carrier charges twice the domestic First Class rate based on the aggregate weight of each shipment. By treating the consolidated package as a single letter whose postage is determined by the weight of the entire package,

remailers can satisfy the cost test and charge a lower rate than if the postage payable were calculated separately for each piece of mail in the package addressed to a different addressee. The Postal Service argues that this practice of the remailers is inconsistent with both the intent and terms of the suspension for extremely urgent mail and proposes revising the regulations to make it clear that the carriers' current practices are prohibited by the Private Express Statutes. Notice, 50 Fed. Reg. at 41,462.

Under the Postal Reorganization Act ("PRA"), the Postal Service may not initiate either civil or criminal court actions.<sup>5</sup> Rather, under 39 U.S.C. 409(d), "[t]he Department of Justice . . . furnish[es] . . . such legal representation as [the Postal Service] may require. . . ." The Department of Justice rejected the Postal Service's requests to sue the remailers under the PES, refusing to accept the Postal Service's view that they failed to qualify for the "extremely urgent letter" suspension. Pet. at 9. Furthermore, the Department has repeatedly stated during the rulemaking proceedings, prior to adoption of the rule suspending the PES for international remailing, that "it will not prosecute remailers or their customers on the basis of current Postal Service regulations." Letter dated May 2, 1986, to Charles D. Hawley, Assistant General Counsel, U.S. Postal Service, from Deputy Assistant Attorney General Charles F. Rule, Ad. Rec. at 106, p. 2; App. 12a. That letter attached a February 26, 1986, letter from the Attorney General to the Postmaster General stating that remailers constituted "lawful private sector competition to the Postal Service," and a letter dated April 2, 1986, from an Assistant Attorney General to a United States Senator stating that "the Department of Justice will not seek to prosecute interna-

<sup>5</sup> Although the basic PES prohibitions are found in the criminal code, the Justice Department sometimes seeks civil injunctions against those who violate them. See, e.g., *U.S. Postal Service v. Brennan*, 574 F.2d 712 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

tional remailers or their customers on the basis of the current regulations." *Id.*; App. 16a.

In its proposed 1985 regulation, later withdrawn, the Postal Service attempted to overcome the Department of Justice's objections to prosecuting remailers by closing the perceived loopholes in the existing regulations. 50 Fed. Reg. 41,462 (October 10, 1985). The proposed regulations would have narrowly restricted international remailing by (1) making it clear that letters which travel over post routes, even though destined for foreign countries, fell within the monopoly; (2) eliminating the "loss of value" test altogether for international mail, and (3) permitting aggregation for the purposes of meeting the "cost test" only for letters destined for the same ultimate foreign recipient. See comments of Department of Justice, *supra*, at 11-12. It was presumed that, once the proposed regulation were adopted, the Postal Service would again "ask the Department of Justice for authority to enjoin remailers from violating the Private Express Statutes." *Id.* at 2.

Ultimately, the Postal Service reversed itself and proposed to suspend the PES for virtually *all* international remailing.<sup>6</sup> Although the Department of Justice in the end supported the proposed suspension (Ad. Rec. at 114), it made it clear in the second phase of rulemaking that "[t]he Department s[aw] no need for a new rule" because the practice of international remailing, as described above, was legal under current regulations. Letter of Charles F. Rule, *supra*, p. 2, Ad. Rec. at 106; App. 12a.

<sup>6</sup> Under this suspension, international remailers would be free to operate whether or not they fit within the existing "extremely urgent letter" suspension, as interpreted by the Department of Justice. The only prohibition surviving in the final rule was of remailing of letters abroad which were destined for ultimate delivery in the United States. 51 Fed. Reg. at 29,637-638.

## ARGUMENT

1. Where, as here, a party intervenes on the side of a government defendant, and the latter declines to seek review in this Court, the intervenor who petitions this Court to review the decision below must establish his own standing. *Diamond v. Charles, supra*, 476 U.S. at 63. Even though the petitioner, as a party in the district court, may fall within the class of persons who may seek review on certiorari under Rule 12 of this Court, this alone will not suffice for jurisdictional purposes. *Id.* Although intervenors are considered parties in this Court, "... an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Id.* at 68. The petitioner cannot do so here.

2. The first reason why the petitioner is precluded from seeking review is that no case or controversy exists between it and either Union respondents or the Postal Service on the validity of the remail regulation. Because the Postal Service "alone is entitled to create a" regulation suspending the PES, 39 U.S.C. 601(b), only the Postal Service has a "direct stake" in defending the regulation. *Id.* at 65 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)). Had the Postal Service sought review, a justiciable controversy would have existed between it and the Unions, and ACCA, as an intervenor below, would have had the right to be a party in this Court. However, the Postal Service failed to petition for a writ of certiorari, thus "indicat[ing] its acceptance of [the court of appeals'] decision, and its lack of interest in defending its own [regulation]." *Id.* at 63. Accordingly, even though the Service may now choose to support the position taken by ACCA, and its "interest may be adverse to the interests of" the Union respondents, "its failure to invoke [the Court's] jurisdiction leaves the Court without a 'case' or 'controversy' between" the

Union respondents and the U.S. Postal Service. *Id.* at 63-64; see *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 544 (1986) (school board member sued in his official capacity cannot "step into the shoes of the Board" to petition for certiorari when the Board declined to do so).

3. In addition, ACCA lacks standing because it "is not able to assert an injury in fact." 476 U.S. at 65. See *Lujan v. National Wildlife Federation*, — U.S. —, 58 USLW 5077, 5080 (June 27, 1990). Here the members of ACCA do not face a threat of criminal prosecution or civil injunctive action, *id.*, because the Department of Justice has stated without qualification "that it will not prosecute remailers or their customers on the basis of current Postal Service regulations." Ad. Rec. at 529, p. 2. The possibility of future injury—for example, that officials of the Department of Justice in some future administration may reconsider its position and agree with the Postal Service that international remailing is not sanctioned by the "extremely urgent letter" suspension—will not suffice; such speculative or contingent threats of future harm are not the kind of direct injury which will sustain Article III jurisdiction. *Whitmore v. Arkansas*, — U.S. —, 110 S.Ct. 1717, 1724, 109 L.Ed. 2d 135 (1990) (petitioner was denied the right to intervene in state court to appeal the death sentence of another prisoner; "Petitioner's alleged injury is too speculative to invoke the jurisdiction of an Art. III court."); *Hall v. Beals*, 396 U.S. 45, 49 (1969) (contingent threat); *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952) (same); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (threat of future injury); *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 81 (1961) (same); *Pennell v. San Jose*, 485 U.S. 1, 8 (1988) (same); see generally *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Allen*

*v. Wright*, 468 U.S. 737, 755 (1984); *Valley Forge College v. Americans United*, 454 U.S. 464, 472 (1982).<sup>7</sup>

4. This case is controlled by *Diamond v. Charles*. There, the plaintiffs sued the State of Illinois alleging the unconstitutionality of an Illinois abortion statute. Dr. Diamond, a pediatrician opposed to abortion, intervened on the side of the State to defend the statute. The court of appeals affirmed the grant of a permanent injunction against enforcement of certain of the statutory provisions, and the State did not appeal to this Court. Dr. Diamond did appeal, and this Court noted probable jurisdiction. Thereafter, the Attorney General of the State of Illinois wrote a letter to the Court, stating in part that the State's "interest in this proceeding is identical to that advanced by it in the lower courts and is essentially co-terminous with the position in the issues set forth by the appellants." *Id.* at 61. The Court held that Dr. Diamond had no standing to defend the constitutionality of the statute when the State declined to so do. The Court noted that, had the State appealed, the intervenor would automatically have been a party and could also seek review. "But this ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join." *Id.* at 64.

<sup>7</sup> The Unions did not object to ACCA's intervention in the district court. (The Postal Service did object to intervention as of right.) Of course, the standards for permissive intervention are not necessarily the same as the injury requirement of Article III. See *Diamond v. Charles*, *supra*, 476 U.S. at 68. And there was no occasion to raise the issue in the court of appeals against the absent intervenor. Strictly speaking the standing issue did not become material until the Federal respondent chose not to petition for a writ of certiorari. In any event, because the issue is jurisdictional, it cannot be waived, *id.* at 74 (O'Connor, J., concurring), and may be raised after the writ has been granted. See *Bender v. Williamsport Area School Dist.*, *supra*, 475 U.S. at 450-451 (Court raised standing issue *sua sponte*).

The same is true in this case. The controversy below was between the Unions and the Postal Service. ACCA made no claim in its motion to intervene that its members' business practices would change in any way on account of the final rule suspending the PES. It intervened for no purpose other than to defend the Postal Service's regulation under PRA Section 601(b). It asserted the identical defenses, namely, that the Unions had no standing to assert claims under the PES, and that the record on "public interest" under PRA Section 601(b) supported the rule. See ACCA's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, and Intervenor's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment. Indeed, its principal contention in intervening was that the Postal Service, as a competitor of ACCA's members, could not be relied upon vigorously to defend a rule suspending its monopoly over this kind of mail when it was initially intent on imposing the monopoly on ACCA's members. See Memorandum of Points and Authorities in Support of Air Courier Conference of America's Motion to Intervene at 9-10; App. 9a.<sup>8</sup> Obviously ACCA added nothing new in the court of appeals; it did not even file a brief there. Undoubtedly, had the Postal Service chosen to petition for a writ of certiorari, it would have had standing to do so. But the Postal Service having chosen not to seek review, *Diamond v. Charles* teaches that ACCA cannot use the Postal Service' dispute with the Unions as a basis for standing, any more than Dr. Diamond could defend the constitutionality of the Illinois abor-

<sup>8</sup> ACCA stated that "the USPS must be seen as less than an enthusiastic advocate of the Final Rule it adopted and of the remailers who benefit by it." *Id.* at 10; App. 9a.

tion statute—even with the support of the respondent State<sup>9</sup>—in the absence of an appeal by the State.<sup>10</sup>

On remand from the court of appeals, on the basis of a fortified record, the Postal Service may choose to renew its rule waiving the PES for international remail. This outcome will, of course, cause the issue of the adequacy of the current record to support this suspension to become moot. But even though the Postal Service may choose not to reissue the rule, *Diamond* still precludes review because the Postal Service's failure to adopt a rule suspending the PES for international remailers does not threaten ACCA members with immediate injury.<sup>11</sup> In its motion to intervene, ACCA stated (at p. 7) that its members' annual revenues for international remail were \$50 million, and that "[r]evocation of 39 C.F.R. § 320.8 [the international remail suspension] would present ACCA's members who engage [in] international remail of letters with the Hobson's choice of foregoing \$50 million in sales or force possible civil suits and criminal prosecution under the Private Express Statutes. . . ." But this allegation is meaningless in light of the Department of Justice's blanket refusal to sue or prosecute them or their customers on the basis of existing regulations. And as we showed above, the fear of future litigation is simply not a basis for alleging substantial risk of *present* harm.<sup>12</sup>

<sup>9</sup> We are informed that the Acting Solicitor General now intends to defend the suspension of the PES in this Court.

<sup>10</sup> Although *Diamond* involved a direct appeal, and not a petition for a writ of certiorari, there is no difference in the application of the controlling principles. Standing is an Article III requirement as applicable to certiorari review as to appeals.

<sup>11</sup> ACCA, an association alleging no injury to itself, has standing only insofar as its current members do. See *Valley Forge College v. Americans United*, *supra*, 454 U.S. at 476-477 n.11, and cases cited there. See also *International Union, UAW v. Brock*, 477 U.S. 274 (1986).

<sup>12</sup> This would be the case even were the Department of Justice totally neutral on the matter. International remailers belonging to

5. While there might seem to be an inconsistency between the Unions' position that they have standing and ACCA does not, any inconsistency is more apparent than real. The deficiency in ACCA's standing is its inability to demonstrate injury in fact, a jurisdictional requirement of Article III. While ACCA did question whether the Unions themselves suffered an injury in fact, both the district court and court of appeals found that this "irreducible minimum" standing requirement was met. Pet. App. at 5a-6a, 30a-31a. Neither ACCA nor the Postal Service appealed from the district court's findings on this point. And the Court granted a writ of certiorari only on the single standing issue presented by the petitioner: "Are postal employees within the 'zone of interest' of the statutes that establish and allow the United States Postal Service to suspend the postal monopoly when 'the public interest requires?'" Pet. at i. See Rule 14.1(a) of this Court ("Only the question set forth in the petition, or fairly included therein, will be considered by this Court.").

More importantly, however, unlike ACCA members, the Unions are faced with a threat of immediate injury by the *total* suspension of the PES for international remailing. If adopted, any and all firms may engage in

ACCA contended throughout the rulemaking that they currently comply with the requirements of the "extremely urgent letter" suspension. If this is so, they each have a dispositive defense if they are ever sued.

It may be that ACCA fears a private civil action by the Unions to enjoin their businesses. See *American Postal Workers Union v. React Postal Services, Inc.*, 771 F.2d 1375 (10th Cir. 1985) (unions have a private right of action under the PES); but see *American Postal Workers Union, Detroit Local v. Independent Postal Systems of America, Inc.*, 481 F.2d 90 (6th Cir.), cert. granted, 414 U.S. 1110 (1973), cert. dismissed, 415 U.S. 901 (1974) (contra). But even this fear does not constitute a threat of immediate harm, because these companies may advance their assertedly meritorious defenses there. See *Public Service Comm'n v. Wycoff Co.*, *supra*, 344 U.S. at 245 (stating that the plaintiff there wanted to "win any such case before it is commenced.").

this business, whether or not the letters they carry meet existing conditions for carriage out of the mails, as ACCA members (with Department of Justice support) insist that they do. Clearly ACCA does not claim to, and cannot, represent in this litigation those future, potential members of this trade association which may enter the remail industry without complying with cost and urgency restrictions. See authorities on associational standing cited at p. 11 and 14 n.11, above.<sup>13</sup>

Because the record does not disclose that any current ACCA members fail to qualify under the urgent letter rule, or are otherwise threatened with prosecution, we respectfully submit the writ should be dismissed. See *Diamond v. Charles*, *supra*, 476 U.S. at 67 (facts supporting standing must appear in the record); *Bender v. Williamsport Area School Dist.*, *supra*, 475 U.S. at 546 (same). Alternatively, "[g]iven the interlocutory posture of the case", and the Postal Service's willingness to accept the remand of the court of appeals (Fed. Resp. Opp. at 9), we ask that the writ be dismissed as improvidently granted.<sup>14</sup>

<sup>13</sup> As we stated earlier, ACCA never asserted in its motion to intervene that its present members had an interest in being liberated from the "cost" and "loss of value" tests of the "urgent letter" rule.

<sup>14</sup> We offer as an alternative ground for dismissal that ACCA was not a proper intervenor in the district court, for the reasons explained in Justice O'Connor's concurring opinion in *Diamond v. Charles*, 476 U.S. at 71.

## CONCLUSION

For these reasons, we ask the Court to grant this motion.

Respectfully submitted,

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July 1990

## **APPENDIX**

1a

**APPENDIX**

**ORDER**

HAVING CONSIDERED the Air Courier Conference of America's (ACCA) motion to intervene, memorandum of points and authorities in support thereof, the responses of plaintiff and defendant thereto, and the entire record herein and it appearing to the Court that the motion should be granted, it is this 26 day of February, 1988;

ORDERED that ACCA's motion to intervene be and is hereby granted pursuant to Rule 24(b).

/s/ Charles R. Richey  
United States District Judge

# AIR COURIER CONFERENCE OF AMERICA'S MOTION TO INTERVENE

The Air Courier Conference of America (ACCA) hereby moves pursuant to Rule 24(a) of the Federal Rules of Civil Procedure to intervene as a matter of right.

The bases and reasons for ACCA's motion are set forth in the attached Supporting Memorandum of Points and Authorities. A Proposed Order is also attached.

Respectfully submitted,

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Counsel for Air Courier  
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Dated: January 29, 1988

Of Counsel:

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\* \* \* \*

# MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AIR COURIER CONFERENCE OF AMERICA'S MOTION TO INTERVENE

## I. INTRODUCTION

The Air Courier Conference of America (ACCA) has moved under Rule 24(a) of the Federal Rules of Civil Procedure to intervene in this proceeding. ACCA's motion is grounded on the facts that: (1) ACCA and its members' rights may be adversely affected by this lawsuit and (2) the United States Postal Service (USPS or Postal Service) will not adequately protect those rights.

## II. STATEMENT OF FACTS

ACCA is a trade association including private overnight couriers, which deliver extremely urgent letters domestically and internationally, and international remailers, which pick up foreign bound mail and transport it in bulk to foreign post offices for remailing to foreign destinations. Of ACCA's 180 members, 120 are carriers and those of which engage in remail account for virtually all the private remail business in the United States.

During the two 1985-1986 rulemaking proceedings conducted by the USPS which culminated in the issuance of 39 C.F.R. § 320.8, comments were submitted by the International Remail Committee (Remail Committee) in support of an exemption for international remail of letters from the postal monopoly and the Private Express Statutes. See Comments on the International Remail Committee (December 12, 1985) attached as Exhibit A. The Remail Committee was an *ad hoc* group of certain interested ACCA members which drew financial support from ACCA. Many of the Remail Committee members are still members of ACCA. In addition, Federal Express, DHL, Purolator, Airborne, and United Parcel Service all current ACCA members, and ACCA itself

submitted comments in opposition to the originally proposed rule declaring remail outside the scope of the extremely urgent letter exemption of 39 C.F.R. § 320.6. These comments are attached as Exhibit B.

The members of ACCA engaged in remailing have substantial rights at issue in this proceeding, inasmuch as revocation of 39 C.F.R. § 320.8 as sought by plaintiffs would cause irreparable injury to such remailers. Moreover, because the USPS only grudgingly adopted 39 C.F.R. § 320.8 after Congressional and Executive Branch pressure on it to do so, the USPS will not adequately protect the remailers rights.

### III. DISCUSSION

Rule 24(a) provides that:

Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Judge Flannery in *Grumman v. Flexible Corp.*, 102 F.R.D. 36, 38 (D.C. D.C. 1983) recently repeated the legal premise of intervention under Rule 24:

The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all the parties with a real stake in a controversy are afforded an opportunity to be heard.

*Grumman, supra*, quoting *Hodgson v. United Mine Workers*, 473 F.2d 118, 130 (D.C. Cir. 1972).

The Courts have held that motions to intervene as a matter of right under Rule 24(a) will be granted if they

satisfy the following four requirements: (1) application for intervention must be timely; (2) the applicant must show an interest in the property or transaction that is the subject of the action; (3) disposition of the action may impair or impede the applicant's ability to protect that interest; (4) the existing parties to the litigation do not adequately represent the intervenor's interests. *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977) (*Natural Resources*).

#### 1. ACCA's Application For Intervention is Timely

The key to determining timeliness is whether the applicant delayed its Motion to Intervene pursuant to Rule 24(a) sufficiently to prejudice the existing parties to the litigation. *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970). Intervention will not be denied if it will not substantially delay trial. Moreover timeliness is to be determined by all the circumstances. *Natural Resources, supra* 561 F.2d at 907.

ACCA's intervention would not delay or prejudice the adjudication of the right of the other parties to this lawsuit. USPS's answer was filed on January 25, 1988. The discovery and pretrial practice to date has been minimal.<sup>1</sup> No trial date has been set. Accordingly, ACCA's instant Motion to Intervene is timely.

#### 2. ACCA And Its Members Have An Interest in the Subject Matter of This Action

As Judge Gasch stated in *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 99 F.R.D. 607 (D.C. D.C. 1983) (NRDC):

<sup>1</sup> Apart from the answer to the complaint, the sum and substance of the activities in this case have been the service of a set of as yet unanswered interrogatories and document requests by plaintiffs on December 18, 1988 and the filing of defendant's Motion for a Protective Order against plaintiffs' discovery on January 15, 1988.

The first consideration the interest requirement has been interpreted in broad terms, and the United States Court of Appeals for the District of Columbia has stated that "the 'interest test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."

99 F.R.D. at 609, quoting *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981).

ACCA and those of its members which engage in international remail of letters pursuant to the exemption to the Private Express Statutes embodied in 39 C.F.R. § 320.8 have a direct interest in the subject matter of this lawsuit. That interest is of record in the Postal Services's rulemaking which resulted in promulgation of the § 320.8 exemption. See Exhibit A. These comments by the Remail Committee, ACCA and its current members were solicited in the originally proposed rulemaking to "clarify" (narrow) the suspension for extremely urgent letters on October 10, 1985, 50 *Federal Register* 41462. It is the comments in opposition to USPS original October 10, 1985 proposal that the Postal Service adoption in support of the Final Rule issued on August 20, 1986, 51 *Federal Register* 29636.

Judge Gasch's finding in *NRDC*, where trade associations sought to intervene in support of certain EPA regulations, is equally apt here:

If plaintiffs succeed in this case, these regulatory decisions, which are obviously in the intervenor's interests, will be set aside. Thus the intervenors can be said to have a substantial and direct interest in the subject of this litigation.

*NRDC*, *supra*, 49 F.R.D. at 609.

Clearly ACCA's members' support of the rule adopted and embodied by 39 C.F.R. § 320.8 reflect no less a substantial and direct interest in this action seeking revoca-

tion of the Rule 320.8 adopted by the Postal Service than those of the intervenors in *NRDC*.

### 3. *Disposition of This Action May Adversely Affect ACCA's Interests*

ACCA and its remail members have a direct interest in the outcome of this action. ACCA's remail members conduct a substantial volume of business pursuant to the 39 C.F.R. § 320.8 the rule at issue. Indeed, ACCA estimates roughly that its members account for virtually all private international remail of letters under the Rule. ACCA's counsel's rough estimate is that its members total international remail of letters amounts to approximately 3500 tons which amount to estimated total sales of over \$50 million. Although substantial in terms of sales by ACCA members and even as a percentage of USPS's outbound international letter traffic (roughly one third) these figures pale in the context of USPS's total revenues of \$29 billion in fiscal year 1986.

Revocation of 39 C.F.R. § 320.8 would present ACCA's members who engage international remail of letters with the Hobson's choice of foregoing \$50 million in sales or face possible civil suits and criminal prosecution under the Private Express Statutes, 39 U.S.C. §§ 601-606 and 18 U.S.C. §§ 1693-1699, 1724.

ACCA's intervention as a representative of the interests of the remail industry is appropriate. See *NRDC*, *supra*. In that case a number of trade associations were permitted to intervene as defendants as a matter of right.

In short, ACCA and its members have no less an interest in the subject matter of this action than the plaintiffs who seek revocation of § 320.8. Indeed revocation of § 320.8 would cause immediate and irreparable injury to the international remail industry.

#### 4. ACCA And Its Members' Interests Are Not Represented By Any of the Parties

As Judge Gasch said in *NRDC*:

The . . . final part of the test for intervention as of right concerns the adequacy of representation of the intervenors interests by existing parties. *Intervenors have only the minimal burden* of showing that representation of their interest by existing parties may be inadequate.

*NRDC*, *supra* 99 F.R.D. at 610 (emphasis added).

The interests of ACCA and its international remail members who operate pursuant to Rule 320.8 are not adequately represented by any of the parties of this lawsuit. Obviously, the plaintiffs, who seek revocation of Rule 320.8 which ACCA and its members support and pursuant to which such members engage in international remail of letters, have interests directly at odds with ACCA and its members.

The Postal Service also does not adequately represent ACCA and its members' interests. In *NRDC* the court recognized that although "facially, it would seem that the EPA and the intervenors have the same interest" the interests of the intervenors and the government agency whose actions they sought to uphold "cannot always be expected to coincide." *NRDC*, *supra* 99 F.R.D. at 610. Judge Gasch noted that the intervenors represented a narrower interest than the agency and it was sufficient that their interests might at some stage of the proceedings; that they would differ on procedures; or, citing *Natural Resources*, *supra*, that they might disagree on the timing of the promulgation of regulations pursuant to a settlement. *Id.* The potential problems that were found to meet the "minimal burden" in *NRDC* are far more immediate in this case.

First, as originally proposed by the Postal Service on October 10, 1985, the proposed rule would have narrowed

the existing administrative exception to the postal monopoly so as to explicitly prohibit International Remail. It was only after substantial pressure was brought to bear on the Postal Service by the executive branch that USPS issued the Final Rule on August 20, 1986 specifically suspending the operation of 39 U.S.C. § 601(a)(1)-(6) and 39 C.F.R. § 310.2(b)(1)-(6). That pressure included comments from the United States Department of Justice (December 12, 1985), attached hereto as Exhibit C. The substance of the Postal Service's original proposal and the degree and scope of participation that was necessary to reverse that proposal to result in the Final Rule bespeaks the Postal Service's reluctance to adopt the Final Rule it now finds itself defending.

Second, this case involves the unusual situation where the rulemaking authority lies with a governmental agency which is an actual competitor of the industry affected by its rules. The Postal Service competes head-to-head with the remailers. Quite apart from the competition policy and antitrust concerns that are inherent where a competitor seeks to regulate its competition, the competition between the remailers and the Postal Service makes their respective interests self-evidently divergent.

Under the circumstances, the USPS must be seen as less than an enthusiastic advocate of the Final Rule it adopted and of the remailers who benefit by it. Accordingly, ACCA and its members, who are the most directly affected by the Final Rule challenged by the plaintiff unions, cannot rely upon the Postal Service to adequately represent their interests and should therefore be permitted to intervene.

#### IV. CONCLUSION

For the reasons stated ACCA respectfully requests this court to permit ACCA to intervene in this proceeding.

Dated: January 29, 1988

10a

Respectfully submitted,

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[Note: Exhibits are omitted from this appendix.]

11a

[SEAL]

U.S. Department of Justice  
Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 2, 1986

Charles D. Hawley, Esquire  
Assistant General Counsel  
United States Postal Service  
475 L'Enfant Plaza, S.W.  
Washington, D.C. 20260-1100

Re: Restrictions on Private Carriage of Letters; With-  
drawal of Proposed Rules; Advance Notice of Pro-  
posed Rulemaking and Request for Information

Dear Mr. Hawley:

I am writing in response to your March 18, 1986 letter to the Department of Justice ("Department") requesting information that might be considered by the Postal Service in fashioning a suspension of the Private Express Statutes for international remail services. I understand that an identical letter has been sent to all parties that filed comments in the remail rulemaking.<sup>1</sup>

Pursuant to the March 4, 1986 statement by John McKean, Chairman of the Board of Governors of the Postal Service ("McKean Statement"), the Postal Service was ordered to withdraw the previously proposed

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<sup>1</sup> Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rules; Advance Notice of Proposed Rulemaking and Request for Information, 51 Fed. Reg. 9852 (March 21, 1986) ("Notice").

rules on which we and others commented,<sup>2</sup> and to initiate a new rulemaking to "preserve the benefits of desirable competition between the Postal Service and private companies."<sup>3</sup> The letter and Notice represent that the information requested is needed "as a basis for proposing a new suspension of the [Private Express] Statutes" and solicit "views as to the scope of a suspension which will best serve the relevant interests" and "specific language for implementing regulations."<sup>4</sup>

The Department sees no need for a new rule. As the Attorney General has stated, international remail represents "lawful private sector competition to the Postal Service."<sup>5</sup> Moreover, the Department has indicated that it will not prosecute remailers or their customers on the basis of current Postal Service regulations.<sup>6</sup> Under these circumstances, a protracted rulemaking will only serve to raise uncertainty as to the legal status of lawful private sector services that numerous executive agencies and the Board of Governors of the Postal Service find beneficial to consumers.

Furthermore, even if a new rule were necessary to clarify that international remail is lawful, the com-

<sup>2</sup> Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters; 50 Fed. Reg. 41462 (October 10, 1985); See also Comments of the United States Department of Justice. In the Matter of Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters, December 12, 1985 ("Department Comments").

<sup>3</sup> Notice, 51 Fed. Reg. at 9853.

<sup>4</sup> Notice, 51 Fed. Reg. at 9852.

<sup>5</sup> See Letter from Attorney General Edwin Meese to Postmaster General Albert V. Casey, February 26, 1986 (copy attached).

<sup>6</sup> See Letter from Assistant Attorney General John R. Bolton to Senator Alfonse D'Amato, April 2, 1986 (copy attached).

ments filed in the earlier remail proceeding and the Postal Service's own internal reports provide an ample record on which to base any rule that the Postal Service deems necessary to "remove the cloud" over remail that it sees under current regulations.<sup>7</sup> The information request and the accompanying procedural schedule will only delay resolution of this matter.

In sum, the Postal Service's conduct of the remail proceeding may reflect a fundamental reluctance to accept the benefits of marketplace competition, contrary to the expressed mandate of the Board of Governors:

The Board of Governors does not believe that any attempt to suppress this kind of competition would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people.<sup>8</sup>

Consistent with this policy pronouncement, and the policy of this Administration to foster and promote private sector competition in international mail, we strongly urge the Postal Service to abandon the remail proceeding. Alternatively, the Postal Service should resolve the proceeding expeditiously on the basis of the existing record so that the benefits of private sector competition may continue to be enjoyed by consumers of international mail services.

Please include this document in the public file of this proceeding.

Sincerely,

/s/ Charles F. Rule  
CHARLES F. RULE  
Deputy Assistant Attorney General  
Antitrust Division

Enclosures

<sup>7</sup> *Id.* at 51 Fed. Reg. 9853. See generally Department Comments at 19-22.

<sup>8</sup> See Notice, 51 Fed. Reg. at 9853. See also Department Comments at 19-22.

[SEAL]

OFFICE OF THE ATTORNEY GENERAL  
Washington, D.C. 20530

26 February 1986

The Honorable Albert V. Casey  
Postmaster General  
United States Postal Service  
475 L'Enfant Plaza, S.W., Room 10022  
Washington, D.C. 20260-1000

Dear Mr. Postmaster:

I understand that on 3 March 1986, the Board of Governors of the United States Postal Service will consider proposed rules that, if adopted, will materially and adversely affect the ability of remail services to compete for international mail traffic. Our Antitrust Division filed comments with you on 12 December 1985, opposing these proposed rules. I would like to reiterate the concerns of this Department about the effect of the proposed rules on competition and consumer welfare.

As the Antitrust Division has explained, there are significant public benefits from lawful private sector competition in the provision of international postal services. Remailers have been able to offer service to United States businesses competing abroad at costs and terms that are apparently viewed by users as better than those offered by the Postal Service. I understand that competition from remailers has forced the Postal Service to introduce new international services. By stifling lawful private sector competition, the proposed regulations will undermine economic efficiency and will inhibit Postal Service incentives to innovate and to price its international services competitively—all to the detriment of consumer welfare.

Given the Administration's policy in favor of competition and against unnecessary regulation, I urge you to

follow the recommendation filed by our Antitrust Division and not promulgate the proposed rules. I understand that these same issues will be relevant to Administration review of the 1984 Universal Postal Union Convention, and I hope the Convention will be submitted shortly for Administrative review. By copy of this letter, I am informing the remaining members of the Board of our position on this matter.

Sincerely,

/s/ Edwin Meese III  
EDWIN MEESE III  
Attorney General

cc: Members of the Board of Governors,  
United States Postal Service

[SEAL]

U.S. Department of Justice  
Office of Legislative and Intergovernmental  
Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

02 Apr 1986

Honorable Alfonse D'Amato  
United States Senate  
Washington, D.C. 20510

Dear Senator D'Amato:

I am writing in response to your February 13, 1986 letter to Attorney General Meese. Your letter seeks written confirmation from the Department of Justice that international remailers "are not acting illegally" under current Postal Service regulations.

I am enclosing for your information a letter from the Attorney General to Postmaster General Casey that indicates our view that remailers currently provide "lawful private sector competition" to the Postal Service. I also enclose a March 4, 1985 Statement of John R. McKean, who is the chairman of the Postal Service Board of Governors. That statement indicates that the Board of Governors views competition from remailers as being in the public interest. That statement also indicates that the Board of Governors has ordered the Postal Service to commence a rulemaking proceeding to "remove the cloud" over remailing that, in their opinion, is created by current Postal Service regulations.

Under these circumstances, you may be assured that the Department of Justice will not seek to prosecute international remailers or their customers on the basis of the current regulations.

We hope that you find this information useful in clarifying the lawfulness of international remail and in minimizing the adverse effects that the current situation has had on your remailer constituents.

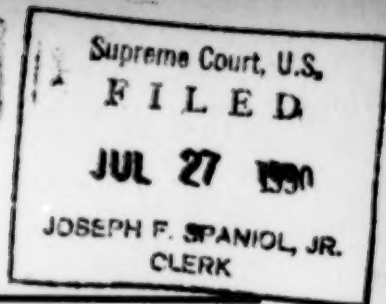
Sincerely,

/s/ John R. Bolton  
JOHN R. BOLTON  
Assistant Attorney General

Enclosures

cc: Louis A. Cox, Esquire  
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U.S. Postal Service  
475 L'Enfant Plaza, S.W.  
Washington, D.C. 20260-1100

(6)  
No. 89-1416



# Supreme Court Of The United States

October Term, 1990

AIR COURIER CONFERENCE OF AMERICA,

*Petitioner,*

v.

AMERICAN POSTAL WORKERS UNION,

AFL-CIO, et al.,

*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia

## JOINT APPENDIX

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Petition for Certiorari Filed March 8, 1990 - Certiorari Granted June 4, 1990

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The following opinion, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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**RELEVANT DOCKET ENTRIES****UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>PLAINTIFF</b> <b>AMERICAN POSTAL WORKERS</b> <b>UNION, AFL-CIO, et al.</b>	<b>DEFENDANT</b> <b>UNITED STATES</b> <b>POSTAL SERVICE</b>
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CIVIL ACTION NO. 87-3199

DATE	NO.	PROCEDURES
11/25/87	1)	Filed complaint for declaratory and injunctive relief.
12/18/87	2)	Filed plaintiffs' first set of interrogatories.
12/18/87	3)	Filed plaintiffs' first request for production of documents.
01/15/88	4)	File defendant's motion for a protective order, memorandum of points and authorities in support thereof, and proposed order.
01/21/88	5)	Notice of Judge Richey setting a conference, order announcing Rule 26 through Rule 37 motions not favored, and Judge Richey's trial certification sheet.
01/25/88	6)	Filed defendant's answer to the complaint.
01/29/88	7)	Air Courier Conference of America's (ACCA) motion to intervene, memorandum of points and authorities in support thereof and proposed order.

02/05/88	8)	Plaintiffs' cross-motion to compel discovery, opposition to defendant's motion for a protective order and memorandum in support of cross-motion to compel discovery, and proposed order.
02/11/88	9)	Filed order granting defendant's motion for a protective order.
02/11/88	10)	Filed order granting plaintiffs' motion for an extension of time.
02/18/88	11)	Filed defendant's motion for enlargement of time and memorandum of points and authorities in support thereof, and proposed order.
02/18/88	12)	Order granting defendant's motion for enlargement of time.
02/19/88	13)	Filed defendant's response to ACCA's motion to intervene.
02/26/88	14)	Order granting ACCA's motion to intervene.
02/29/88	15)	Order setting briefing schedule for case disposition on cross-motions for summary judgment.
03/10/88	16)	Filed plaintiff's first set of interrogatories to ACCA.
03/10/88	17)	Filed plaintiff's first request to ACCA for production of documents.
03/25/88	18)	Filed defendant's motion to dismiss or in the alternative for summary judgment, defendant's statement of material facts as to which there is no genuine issue, memorandum of points and authorities in support of motion to dismiss, declaration of

		Charles D. Hawley and proposed order.
03/25/88	19)	Filed defendant's first notice of filing, declaration of Charles D. Hawley and index to administrative record.
04/12/88	20)	ACCA's objections to plaintiff's first set of interrogatories.
04/12/88	21)	ACCA's memorandum of points and authorities in support of defendant's motion to dismiss or in the alternative for summary judgment.
04/12/88	22)	ACCA's Notice of address change.
04/22/88	23)	Filed order setting hearing on motion for summary judgment or to dismiss.
04/24/88	24)	Filed plaintiffs' motion for summary judgment, statement of material facts as to which there is no genuine issue and memorandum in support of plaintiffs' motion for summary judgment and in opposition to defendant's motion for summary judgment.
04/25/88	25)	Filed plaintiffs' notice of filing of exhibits.
04/28/88	26)	Filed plaintiffs' notice of filing of proposed order.
05/04/88	27)	Filed order resetting hearing on motion for summary judgment and to dismiss.
05/16/88	28)	ACCA's motion for an extension of time.
05/16/88	29)	ACCA's motion corrected certificate of service.

05/16/88	30)	Defendant's motion for an enlargement of time and to reschedule date of oral argument.
05/20/88	31)	Filed order granting ACCA's motion for enlargement of time.
05/20/88	32)	Filed order granting defendant's motion for an enlargement of time and to reschedule date of oral argument.
05/26/88	33)	Filed defendant's motion for an enlargement of time and memorandum of points and authorities in support thereof.
05/27/88	34)	Filed defendant's motion for an enlargement of time and memorandum of points and authorities in support thereof.
05/31/88	35)	Filed defendant's opposition to plaintiffs' cross-motion for summary judgment and reply to opposition to defendant's motion for summary judgment.
06/03/88	36)	Filed order granting defendant's motion for an enlargement of time and to extend time to file reply.
06/08/88	37)	ACCA's motion for an enlargement of time.
06/08/88	38)	ACCA's memorandum in opposition to plaintiffs' motion for summary judgment and in reply to plaintiffs' opposition to defendant's motion for summary judgment.
06/13/88	39)	Filed order granting ACCA's motion for enlargement of time.

- 06/16/88 40) Filed plaintiffs' reply memorandum to defendant's opposition to plaintiffs' cross-motion for summary judgment with Rutner declaration.
- 06/16/88 41) Filed plaintiffs' motion for an enlargement of time and memorandum of points and authorities in support thereof.
- 06/16/88 42) Filed plaintiffs' motion to strike declarations, memorandum in support thereof and proposed order.
- 06/24/88 43) Filed defendant's motion for enlargement of time and memorandum of points and authorities in support thereof.
- 06/29/88 44) Filed order granting plaintiffs' motion for an enlargement of time.
- 07/01/88 45) Filed order granting defendant's motion for an enlargement of time.
- 07/11/88 46) Filed defendant's opposition to plaintiffs' motion to strike declarations.
- 10/17/88 47) Filed order entering judgment for the defendant.
- 12/20/88 48) Opinion of Charles R. Richey.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## APPELLANTS

AMERICAN POSTAL WORKERS  
UNION, AFL-CIO, et al.

## APPELLEE

UNITED STATES  
POSTAL SERVICE

-----  
APPEAL NO. 88-5436

DATE	NO.	PROCEEDINGS
12/22/88	49)	Notice of Appeal
01/23/89	50)	Appellants' (American Postal Workers Union, AFL-CIO, and National Association of Letter Carriers, AFL-CIO) docketing statement and initial submissions
07/17/89	51)	Appellants' Brief
07/26/89	52)	Certified Original Record on Appeal - 2 vol.; 1 vol. of transcript
08/17/89	53)	Appellee's Brief
08/30/89	54)	Appellants' Reply Brief
09/07/89	55)	Joint Appendix
09/19/89	56)	Appellee's Brief
09/19/89	57)	Appellants' Brief
09/19/89	58)	Appellants' Reply Brief
10/13/89	59)	Argued before Chief Judge Wald; Circuit Judges Mikva and Ruth B. Ginsburg
12/8/89	60)	Opinion for the Court filed by Circuit Judge Mikva
12/8/89	61)	Opinion concurring filing by Circuit Judge Ruth B. Ginsburg

- |          |     |   |
|----------|-----|---|
| 12/8/89  | 62) | Judgment by this Court that the Judgment of the District Court appealed herein is remanded in accordance with the opinion of the Court filed herein this date |
| 12/8/89  | 63) | Mandate Order   |
| 02/06/90 | 64) | Receive entry of appearance from L. Peter Farkas on behalf of Air Courier Conference of America   |
| 03/13/90 | 65) | Notice of filing of petition for writ of certiorari   |
| 03/23/90 | 66) | Mandate issued  |

The Postal Service recognizes its first priority is to compete on the basis of good service at reasonable price. Yet it also believes that the activities of certain "re-mailing" companies violate the Private Express Statutes. These companies bypass the Postal Service and ship foreign destination letter mail collected from U.S. customers to a foreign point, where the postage of that country is applied and the letter mail then put in the foreign mailstream. The amount of mail lost to the Postal Service, while not quantified, is believed to be very significant. The Postal Service has asked the Justice Department to take action in these cases.

\*EXCERPT FROM PAGE 40, OF THE 1985 COMPREHENSIVE STATEMENT ON POSTAL OPERATIONS.

## POSTAL SERVICE

### 39 CFR Parts 310 and 320

#### **Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters; Change of Phone Number**

AGENCY: Postal Service

ACTION: Correction of Proposed Rule.

SUMMARY: On October 10, 1985, the Postal Service published in the Federal Register (50 FR 62) a proposed modification and clarification of the regulations on the Private Express Statutes. On October 15, 1985, the telephone numbers at Postal Service Headquarters were changed. This document provides the new number for telephone contact concerning the above proposed rule.

DATE: Comments must be received on or before November 12, 1985.

ADDRESS: Written comments should be addressed to the General Counsel, Law Department, United States Postal Service, Washington, D.C. 20260-1113. Copies of all written comments will be available for inspection and photocopying between 9:00 a.m. and 4:00 p.m., Monday through Friday, in Room 5128, 955 L'Enfant Plaza, SW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley (202) 268-2970.

W. Allen Sanders,  
*Associate General Counsel, Office of General Law and Administration.*

[FR Doc. 82-25065 Filed 10-20-85; 8:45 am]

### 39 CFR Parts 310 and 320

#### **Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters; Extension of Comment Period.**

AGENCY: Postal Service.

ACTON: Proposed Rule; Extension of comment period.

SUMMARY: On October 10, 1985, the Postal Service published in the Federal Register (50 FR 41462) a proposed modification and clarification of the regulations on the Private Express Statutes, which was corrected in a minor respect on October 22, 1985 (FR 42729).

Several parties have requested that the comment period, originally thirty days, be extended. Because of the substantial public interest in the proposal and the likelihood that a modest extension of the comment period will permit greater public participation in this rulemaking process, the Postal Service is extending the comment period by an additional thirty days. The extended comment period will expire on December 12, 1985.

DATE: Comments must be received on or before December 12, 1985.

ADDRESS: Written comments should be addressed to the General Counsel, Law Department, United States Postal Service, Washington, D.C. 20260-1113. Copies of all written comments will be available for inspection and photocopying between 9:00 a.m. and 4:00 p.m., Monday through Friday, in Room 5128, 955 L'Enfant Plaza, S.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley (202) 268-2970.

Fred Eggleston,  
*Assistant General Counsel Legislative Division.*

[FR Doc. 85-26742 Filed 11-7-85; 8:45 am]

**ACCA**  
**Air Courier Conference of America**  
 RE: 39 CRR Parts 310 &

October 28, 1985

General Counsel, Law Department  
 United States Postal Service  
 Washington, D.C. 20260-1113

Dear Sir,

The Air Courier Conference of America (ACCA) is the trade association for the air courier and express industry. Its members are 142 companies who provide domestic and international courier and express services.

ACCA wants to express its opposition to the proposed rulemaking. It is ACCA's position that there should be *no* postal monopoly and all services provided by the Post Office should be subject only to free and open competition in the market place.

The proposed rulemaking purports to attack one group of companies who can provide a less expensive alternative to the post office mailing overseas. ACCA believes that this savings to U.S. companies should not be eliminated but should be commended. This is free enterprise at its best. The more efficient and less costly alternative should be encouraged.

Sincerely yours,

Larry P. Rodberg  
 President

**United States Postal Service**  
**475 L'Enfant Plaza, SW**  
**Washington, DC 20260**

November 20, 1985

Mickey Leland, Chairman  
 Frank Horton, Ranking Minority Member  
 U.S. House of Representatives  
 Committee on Post Office and Civil Service  
 Subcommittee on Postal Operations and Services  
 209 Cannon House Office Building  
 Washington, D.C. 20515

Dear Messrs. Leland and Horton:

Mr. Carlin has asked me to respond to your letter of October 28 expressing interest in the Postal Service's proposed amendment to the regulations implementing the Private Express Statutes and requesting a thirty-day extension of the comment period. As I advised your staff, the comment period for this proposal was extended for thirty days by a notice published in the *Federal Register* on November 8.

You have asked a number of questions about the proposed amendments, which we are happy to answer:

1) Why does the USPS consider the proposed changes in this regulation necessary?

It is needed to prevent the misuse of an administrative suspension of the Statutes, adopted to permit the private carriage of extremely urgent letters, to carry abroad large numbers of letters that are not extremely urgent for delivery as ordinary mail by foreign postal systems. As discussed in greater detail in the published notice, the amendments will make it clear that this

practice, known as "international remailing," is not permitted by that suspension.

2) What action does the USPS intend to take against these remailers if the proposed changes in this regulation become a reality?

The Postal Service expects to act as it does now toward firms that do not comply with the Statutes. We would invite the firms' attention to the Statutes' requirements and request compliance. Our experience has been that most reputable firms will not knowingly violate Federal law. If, however, a carrier, for example, were to persist in its violations, we would expect to renew our request to the Department of Justice to authorize suit to enjoin continuing violations.

3) How much volume is involved in this remailing business, both in terms of pieces of mail and dollars?

The Postal Service has no reliable estimates of either the number of letters or the dollars in revenue that are diverted from the United States Mails by remailing activities. It is common knowledge, however, that a number of shippers and carriers engage in this practice, and we infer from this and other information that the volumes and revenues involved are significant.

4) How would the public benefit from the implementation of the proposed changes in the regulations?

The proposed amendments will reduce the diversion of international letters from the mails. This will benefit the public in a rather direct way by increasing postal revenues and contributing to the Postal Service's efforts to achieve its statutory goal of breaking even financially. They will also maintain the integrity of the Statutes and the implementing regulations by ensuring that a suspension adopted for one purpose is not unfairly used for another purpose.

5) Is the USPS planning any further attempts to reclaim business lost to private couriers?

The Postal Service wishes, of course, to provide the best possible service for all of its customers. We are currently testing a new PRESORT INTERNATIONAL program to provide more direct service for our bulk airmail customers to countries overseas, with resulting savings in delivery time. We are also adjusting the rates of our International Surface Air Lift Service and implementing increased service to Latin America. These actions are separate from and independent of our proposed amendments to the Private Express regulations. Nonetheless they illustrate our commitment to serve the needs of our customers in all of the services we provide.

Sincerely,

William T. Johnstone

Before the  
UNITED STATES POSTAL SERVICE

39 CFR Parts 310 and 320:  
Restrictions on Private Carriage of Letters;  
Proposed Clarification and Modification of Definition  
and of Regulations on Extremely Urgent Letters  
— 50 FR 41462 (Oct. 10, 1985)

COMMENTS OF THE INTERNATIONAL  
REMAIL COMMITTEE  
12 DECEMBER 1985

[Excerpts]

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Contrary to the Postal Service's expectations, the proposal to eliminate the remailer competition will not significantly enhance net postal revenues. More likely results include the driving of U.S. jobs and printing activities overseas and a loss of revenues now received from inbound international remail. In some cases, U.S. companies will wind up using other, more cumbersome, less efficient remail procedures which are clearly beyond the reach of the monopoly — rather than using still less efficient postal services. Even if the entire \$60 million per year international remail business (estimated gross) were handled by the Postal Service, it may be estimated that the *net increase in annual postal revenues would be no more than three million dollars, about one fortieth of one percent (0.025%) of total postal revenues*, and probably much less. This is obviously an exceedingly small benefit for the costs and injustices imposed.

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As international commerce became more and more information oriented, in the late 1970's and early 1980's, customers began to demand the advantages of international remail for other, more time-sensitive bulk mailings, such as newsletters, brochures, statements of account, order forms, etc. Perhaps, a key commercial event was the 39 percent increase in international air mail rates in 1981. In any case, it became clear that by combining prompt air freight service to a carefully chosen foreign postal distribution point with the international air mail postal system, it was possible to extend the remail idea to include air freight/air mail service that was faster, cheaper, and more reliable than the Postal Service's international air mail.

\*\*\*

The New Postal Policy Council is a group of about twenty of the largest U.S. banks, securities firms, and public utilities, led by American Express and Citibank. These major institutions (and hence, major mailers) unanimously adopted a resolution strongly supporting private international remail. The Council noted that the proposed rule

*could severely impede international trade. [It is] ill conceived, untimely, and unjustified.... American business currently relies on these private carriers whose service has proved to be far superior to that of the United States Postal Service. The effect of the proposed rule would be devastating to American businesses engaged in international trade; it would hamper efforts to improve our balance of payments; and it is not likely to increase U.S. postal revenues in the long run. In short, it benefits no one. [Resolution of November 15, 1985 (emphasis added).]*

The International Remail Committee also retained an independent polling firm, Hickman-Maslin, to poll users of remail on the role of remail within their businesses. The survey pool consisted of about 300 remail users, the entire customer base of most of the members of the Committee and, we believe, most of the customers of the industry as a whole (in the short time period in which the poll was planned and executed a few members were unable to assemble customer lists due to illness or travel schedules of key executives). When asked which type of service is most often used for a large international mailing, the companies polled split about equally between the USPS and remail. According to Hickman-Maslin, the group appears to be a reasonable, although not scientific, cross section of U.S. organizations engaged in international commerce; the survey is, however, a scientific sampling of the group polled. In short, while an exhaustive study was impossible in the time frame of the comment period, this poll is an accurate reflection of the opinions of a reasonably representative group of some 300 U.S. organizations engaged in international commerce.

The poll first asked users which service, international remail or the comparable postal service, was better, according to various categories. The results follow. Note that we have inflated the USPS figures by adding in all of the "about the same" answers to give USPS every benefit of the doubt.

	USPS better or about the same	Remail better (much better)
Speed of delivery	23%	55% (49)
Reliability	26%	49% (46)
Keeping cost down	22%	57% (54)
Convenience of use	38%	46% (44)
Value for money	19%	60% (57)
Flexibility in unusual situations	11%	50% (47)

Obviously, a substantial majority of those who had an opinion felt that international remail constitutes a superior method of distributing a large worldwide mailing.

The more pertinent question for the instant rulemaking, however, is not which type of service is better, but whether competition between the two types of services is beneficial to American international commerce. On this issue — which is the issue posed by the proposed rule — the judgment of international businessmen was absolutely clear. *Ninety-nine percent* of the respondents felt that alternative international mailing services are important, eighty-one responding "very important." *Ninety-four percent* oppose a postal monopoly on any international shipments. *Sixty percent* believe that restrictions on international remail will "injure the international commerce of the U.S." The entire Hickman-Maslin poll is reproduced as an Appendix to these comments.

\* \* \*

### III. INTERNATIONAL REMAIL DOES NOT DEPRIVE THE POSTAL SERVICE OF SIGNIFICANT NET REVENUE.

The preamble to the proposed rule states that remail is "depriving the Postal Service of revenues in a manner not intended." 44 FR 41462. Although it is the only justification of the proposed rule that even hints at public policy, this conclusory statement is nowhere supported by evidence. Clearly, "more postal revenue," standing alone, is hardly a complete statement of the postal policy of the United States (see next section). In the instant rulemaking, the presumption of significant additional net revenue is not even factually correct, as explained in the following analysis.

The remail industry, we estimate, will gross about \$60 million in 1985, not counting traffic in books and magazines (this is a very rough guess). Of this amount, more than half derives from the handling of printed matter; the remainder, perhaps \$25 million, involves the remail of "first class" items. We shall discuss the effect of the proposed rule on each type of document traffic, and then address the negative revenue effects of foreign retaliation against the Postal Service.

\* \* \*

#### B. The proposed rule is not supported by the traditional public policy principles supporting the postal monopoly.

More generally, we may look behind the principle established by the urgent letter exception to the traditional policy principles which underpin the postal monopoly. The sound development of the monopoly law depends upon constant referral to the principles which justify the monopoly in the first place.

The most authoritative statement of these principles is the 1973 Board of Governors' report to Congress, *The Private*

*Express Statutes and Their Administration.* In this report, the Governors begin by noting the statutory mission of the Postal Service to "bind the Nation together" and "provide prompt, reliable, and efficient service to patrons in all areas." Page 4, citing 39 U.S.C. 101(a). The report notes the duty to provide for letters sealed against inspection at a postage rate "uniform throughout the United States." *Id.*, citing 39 U.S.C. 3623(d). From these statutory duties, the report reasons:

A prohibition on rates varying with distance creates competitive opportunities for skimming the creams of those postal operations that are most attractive from a business standpoint. *It would make little sense to allow letter mail competition without simultaneously authorizing variable rates on letters so that the Postal Service may compete equitably in the marketplace.* But uniform nationwide rates for letter mail should not be lightly discarded. Rates varying with distance would be complicated and confusing for many citizens, would point to increases in regulatory red tape, and could lead to untoward political pressures for changes in zone limits and the like.

The law requires that the Postal Service serve all the nation [quoting 39 U.S.C. 101(b)]. This is a key requirement—perhaps *the* key requirement—if the Postal Service is to discharge its basic function to "provide prompt, reliable, and efficient service to patrons in all areas ... and render postal service to all communities." *This means that the Postal Service must serve those areas and customers for which operating costs are not recoverable under a uniform pricing policy. If the Private Express Statutes were repealed, private enterprise, unlike the Postal Service, would be free to move into the*

*most economically attractive markets while avoiding markets that are less attractive from a business standpoint.*

....Without abandoning the policy of self-sufficiency and re-introducing massive subsidies, it is hard to see how the Postal Service could meet rate and service objectives in the face of cream-skimming competition against its major product. But abandonment of this policy would impose an unjustifiable burden of costs on the tax-paying public and might lead to the erosion of universal postal service.

We believe that the uniform rate and nationwide service requirements are sound.... Accordingly, the service and financial policies that are rightly embodied in the Postal Reorganization Act require the restrictions on private letter-mail carriage be maintained. [Pages 5-7 (emphasis added).]

The Governors' report goes on to cite other, secondary reasons for the postal monopoly including the need to finance the postal inspection service, which insures the safety of the mails and protects the public from undesirable mail matter. Page 7. The report further notes that without a monopoly "international mail reciprocity agreements would also suffer ... Foreign governments would have the problem of whether to deal with several, rather than one, originating mail suppliers. The Postal Service would remain under the obligation of delivering all incoming international mail with less than total compensation for outgoing first-class mail." Page 8.

Reasonable men can, and have, disagreed with some of these principles of postal policy, but that debate is beyond the scope of the current rulemaking. An important and valid ques-

tion, however, is whether the proposed rule is reasonable related from these traditional principles. We submit that it is not.

Clearly, the proposed ban on international remail has no logical relationship with the Postal Service's ability to "bind the Nation together" through universal postal service at a uniform price. "Binding the nation" refers to domestic service; international postal service can hardly claim to partake of the same special importance to the nation. The need to maintain uniform first class mail rates is irrelevant to international remail. There is no international equivalent to the uniform rate rule. On the contrary, the Postal Service adjusts its rates, especially its ISAL rates, market by market depending upon demand and can very well "compete equitable in the marketplace."

Nor is there any international equivalent to the duty to serve small towns at a loss. The Postal Service is "free to move into the most economically attractive markets while avoiding markets that are less attractive from a business standpoint." It has done so, offering ISAL, Presort International, and International Express Mail service only in certain cities in the United States and only to certain destinations overseas. More generally, the Postal Service's costs for international service are more or less unaffected by the remoteness of any given city. Service to the farthest corner of Scotland costs the Postal Service the same as service to downtown London. The Postal Service just puts the mail on the airplane to London and lets the British Post Office deliver it.

Of course, the Postal Service can, and has, noted that a monopoly on international remail would generate additional revenues to pay for losses incurred in providing domestic service to remote cities in the United States. But this argument would justify the monopolization of any activity, for example, the telecommunications business (as indeed it has, in other countries). Under traditional American principles, however, the scope of a monopoly should be reasonably related to the activity

which generates losses, as the rationale articulated in the Board of Governors' report does.

It is clear, then, that the fundamental postal policy bases for the postal monopoly — universal service and a uniform first class mail rate — do not reasonably support a monopoly over international remail.

The Governors' report does on to mention two secondary bases for the monopoly: the need to support the postal inspectors program and certain international mail requirements. Obviously, the need to pay for postal inspectors is only tangentially related to international remail. It is doubtful that the inspection service is much concerned with what is mailed out of the U.S., and the Customs Service is the primary guardian against incoming contraband. Hence, the inspection service does not provide a rational basis for monopoly over international remail.

The matter of international postal agreements is more complicated. The Governors' report argues that "Foreign governments would have the problem of whether to deal with several, rather than one, originating mail suppliers." This is not a problem with the remail industry. The only post office that must deal with the remail company is one that is doing so voluntarily and at a profit. The Governor's report goes on to note that "the Postal Service would remain under the obligation of delivering all incoming international mail with less than total compensation for outgoing first-class mail." The Postal Service, of course, would be obliged to deliver incoming mail, an activity for which it is compensated by the foreign post offices according to the internationally agreed "terminal dues" standard. Since the basic infrastructure of the Postal Service is paid for by the domestic postal service, it appears probable that "terminal dues" compensate the Postal Service for the marginal costs of delivering incoming mail. In any case, the Postal Service benefits from a low terminal dues rate — and has fought for one over the years — because it exports more mail than it

imports. Even if it did not, surely the solution is for the Postal Service to negotiate higher terminal dues, rather than imposing a restrictive monopoly on outgoing American mail in order to pay for below cost delivery of foreigners' inbound mail.

Nor does a vague allusion to "international agreements" provide an independent policy basis. If not grounded in an identifiable American public interest, the international agreement becomes no more than a self-serving market sharing agreement between post offices. The Postal Service would have no excuse for entering into such an agreement.

In short, the traditional rationales for the postal monopoly do not provide a sound basis for extending the monopoly to include the air freighting of bulk international mailings.

\* \* \*

Respectfully submitted,

James I. Campbell, Jr.  
Attorney for the Committee on  
International Remail

Washington, D.C.  
12 December 1985

BY HAND

General Counsel  
Law Department  
U.S. Postal Service  
955 L'Enfant Plaza  
Room 5128  
Washington, D.C. 20260-1113

Re: Restrictions on Private Carriage of Letters;  
Proposed Clarification and Modification of  
Definition and of Regulations on Extremely  
Urgent Letters

Dear Sir:

In accordance with the Notice of Proposed Rulemaking, 50 Fed. Reg. 41,462 (October 10, 1985), I enclose the original and one copy of the Comments of the United States Department of Justice in the above-captioned proceeding.

Sincerely,

Martin L. Stern  
Attorney  
Antitrust Division

Enclosures

Before the  
UNITED STATES POSTAL SERVICE  
Washington, D.C. 20260-1113

IN THE MATTER OF:  
Restrictions on Private Carriage of Letters; Proposed  
Clarification and Modification of Definition and of  
Regulations on Extremely Urgent Letters

COMMENTS OF THE UNITED  
DEPARTMENT OF JUSTICE

Douglas H. Ginsburg  
Assistant Attorney General,  
Antitrust Division

Charles F. Rule  
Deputy Assistant Attorney  
General  
Antitrust Division

Communications with respect to this document should be  
addressed to:

Barry Grossman, Chief  
Communications & Finance Section  
Robert E. Hauberg, Jr.  
Assistant Chief  
Communications & Finance Section  
Martin L. Stern  
Jonathan M. Rich, Attorneys  
Communications & Finance Section  
Michael A. Williams, Economist  
Economic Regulatory Section  
Antitrust Division  
U.S. Department of Justice  
504 Safeway Building  
Washington, D.C. 20530  
202/724-6693

December 12, 1985

Before the  
UNITED STATES POSTAL SERVICE  
Washington, D.C. 20260-1113

IN THE MATTER OF:

Restrictions on Private Carriage of Letters; Proposed  
Clarification and Modification of Definition and of  
Regulations on Extremely Urgent Letters

COMMENTS OF THE UNITED STATES  
DEPARTMENT OF JUSTICE

**I. INTRODUCTION AND STATEMENT  
OF POSITION**

By Notice of Proposed Rulemaking ("Notice")<sup>1</sup> the United States Postal Service has solicited comments on proposed revisions of its regulations governing the private carriage of "extremely urgent" domestic and international mail.

According to the Notice, private carriers, commonly known as "remailers," are diverting revenue from the Postal Service by taking advantage of current Postal Service regulations that allow the private carriage of "extremely urgent" mail. Relying on ambiguities in the regulations, these remailers ship a large number of arguably non-urgent international letters from the United States and deposit them in foreign mailstreams for delivery to separate ultimate addressees. Typically, a remailer collects mail from customers at different locations in the United States, bundles it, and ships it from one domestic point to a single destination overseas. When the mail arrives overseas, the remailer or its agent deposits the mail in a foreign mail system for delivery in that or other countries, often at relatively low foreign postal rates.<sup>2</sup>

<sup>1</sup> 50 Fed. Reg. 41,462 (October 10, 1985) ("Notice").

<sup>2</sup> See *infra* discussion at 5. The Notice neither identifies the specific carriers engaging in remailing, indicates the customers served, nor provide

The Postal Service maintains that such private carriage as currently conducted is not permitted by its current regulations suspending application of the Private Express Statutes for extremely urgent letters. The Postal Service proposes to amend the regulations to "leave no room for question as to the circumstances" under which private carriage of international mail is permitted.<sup>3</sup> Apparently, once the regulations are clarified, the Postal Service intends to ask the Department of Justice for authority to enjoin remailers from violating the Private Express Statutes.<sup>4</sup>

The Department of Justice, the Executive Branch agency responsible for the enforcement of the antitrust laws and the promotion of competition, submits that the changes proposed by the Postal Service would strifle the thriving, competitive market that has developed for the carriage of international mail. We believe that there is some question as to whether the Postal Service possesses the legal authority to extend its domestic monopoly into international carriage in the manner proposed. Questions of legal power aside, it appears certain that the Postal Service's proposal would reduce or eliminate competition in the international postal market to the detriment of American citizens and businesses competing abroad.

As the Postal Service acknowledges, any ability to inhibit competition from remailers stems solely from its authority to prohibit private carriers from transporting letters over the

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any estimate of revenue received for those services. An industry journal, however, suggests that the practice is widespread and notes that a list "of couriers and corporations that are engaged in remail, . . . is almost a 'Who's Who' of American business." *Business Mailers Review*, January 7, 1985.

<sup>3</sup> 50 Fed. Reg. at 41,462.

<sup>4</sup> L. Cox, Remarks at Meeting of the Board of Governors, United States Postal Service 50 (September 6, 1985).

domestic portion of an international journey.<sup>5</sup> Though the Postal Service has historically asserted that its monopoly extends to international mail, its opinions indicate no specific statutory authority other than the prohibition on private domestic carriage. Moreover, the Postal Service claims that its international classifications and rates are not subject to review by the Postal Rate Commission. We suggest that the Postal Service cannot have it both ways. It cannot assert a monopoly of international mail as a necessary adjunct to its domestic statutory monopoly, *i.e.*, when it wants to increase its revenue, and at the same time claim that its international rates are free from the statutory review provided to check its domestic monopoly power. In sum, we believe that the statute itself, as well as the legislative history is ambiguous on the precise geographic scope of the Postal Service's monopoly. We, therefore, urge the Postal Service to seek clarification from Congress, instead of *sua sponte* promulgating regulations that would stifle competition from the private sector that is providing substantial benefits to many American citizens and businesses.

Our concern over the Postal Service's proposal stems from general economic policy considerations as well as from the desire to preserve the benefits currently enjoyed by the remailers' customers. The United States follows a general economic policy of fostering competition as a means of promoting efficiency and consumer welfare. Congress provided for a domestic postal monopoly because it feared that reliance on competition would not have guaranteed universal service at affordable rates. Whatever the current validity of these concerns, the fact that government monopoly services are inherently less efficient than competitive services dictates that consumer welfare will be enhanced if the postal monopoly is construed no more broadly than necessary to attain the goal of universal

<sup>5</sup> "The Private Express Statutes have been consistently applied to the domestic segment of international shipments." 50 Fed. Reg. at 41,462 (emphasis added).

service. The Postal Service has adduced no evidence that continuation of international mail carriage by private firms would undermine that goal. As a consequence, it has failed to justify the significant consumer welfare loss threatened by its proposed prohibition of competitive services.

## II. BACKGROUND

### A. The International Postal Market

American firms use remailers to send bulk mailings to foreign addressees. These bulk mailings typically involve such items as bank statements, periodicals, catalogues, and advertisements, but rarely individual correspondence. Generally, the remailer ships the mail to the foreign postal administration that offers the best combination of speed and price for delivery to the addressee. The postal administration in which the remailer deposits the mail is not necessarily that of the ultimate recipient.

Some foreign postal administrations have sought business by encouraging remailers to post bulk mailings in their countries at relatively low Surface Airlift ("SAL") rates.<sup>6</sup> Surface Airlift programs compete with one another for the patronage of remailers who are willing to introduce mail into the international mail system anywhere in the world.

According to industry officials, when begun several years ago, the SAL programs of foreign postal administrations captured most of the business of forwarding bulk mail originating

<sup>6</sup> It is our understanding that SAL rates are low because it is relatively inexpensive to ship international bulk mail. A postal administration that accepts bagged and sorted mail for delivery to other countries essentially acts as a freight forwarder. The administration ships the mail to the destination country by air and pays the postal administration of that country a fee called "terminal dues" to deliver the mail to the ultimate addressees. Terminal dues are set by the Universal Postal Union, a United Nations affiliate that regulates the postal relationships of member countries. Terminal dues are calculated on a per pound rate basis on the net imbalance in mail sent between two member countries.

in the United States. In response, the Postal Service instituted its own SAL service called International Surface Airlift ("I-SAL"). According to a Postal Service report, I-SAL has recently shown a sharp decline in volume, largely because it has not met the needs of American mailers who have been able to rely on "the heavy competition in the international carriage of bulk printed items."<sup>7</sup> The ability of I-SAL to compete is further hampered because it fails to provide users the efficiency offered by private remailers. To be specific, an I-SAL customer must deliver mail that is sorted and bagged by country of destination to an international airport. In contrast, a remailer will pick up mail at a customer's place of business, sort it and bag it by country, and arrange for delivery through a foreign postal service's SAL, typically at a price below the I-SAL rate. Moreover, because remailers ship mail overseas on more flights per week than I-SAL, they offer more timely service. Finally, remailers typically offer service to more countries than I-SAL.<sup>8</sup>

#### B. The Current Statutory and Regulatory Scheme

The Postal Service currently enjoys a statutory monopoly over the domestic carriage of letters.<sup>9</sup> There are statutory exceptions, however, that permit non-Postal Service carriage of

<sup>7</sup> See U.S. Postal Service, *International Mail — An Overview* 16-17 (1985) (submitted to USPS Board of Governors, September 6, 1985) ("International Mail").

<sup>8</sup> *Id.* at 13, 16-17. The Postal Service is introducing a "Presort Airmail" test program that is designed to provide service comparable to that of the private remailers. Under the proposed service, mailers will sort their mail by country. The Postal Service will collect the mail and ship it overseas the same or following day. Service will be available to all countries of the world. *Id.* at 15-16.

<sup>9</sup> The Private Express Statutes prohibit, with certain exceptions, the establishment of a "private express for the conveyance of letters or packets . . . over any post route . . . or from any city, or town, or place to any city, town, or place, between which the mail is regularly carried. . . ." 18 U.S.C.

letters.<sup>10</sup> Under 39 U.S.C. § 601(b), the Postal Service has exercised the power to suspend the Private Express monopoly where "the public interest" so requires.

In 1979, the Postal Service suspended the Private Express Statutes for the delivery of "extremely urgent letters." 44 Fed. Reg. 61,181, condified at 39 C.F.R. § 320.6. Under current regulations, a letter is considered extremely urgent if it meets either of two tests:

- (1) the "loss of value" test, which requires that the letter must be delivered within a specified time and that its usefulness would be greatly reduced if it were not delivered within that time,<sup>11</sup> or

§ 1696. The carriage of letters by anyone "having charge or control of any conveyance operating by land, air or water . . . otherwise than in the mail" is similarly prohibited. 18 U.S.C. § 1694. The Postal Service has used its rulemaking authority to define "letters" broadly. See *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824 (D.C. Cir. 1979). See also 39 C.F.R. § 31C.1

<sup>10</sup> For example, a letter "may be carried out of the mails" so long as the Postal Service receives the remuneration it would have received if the letter "had been sent by mail." 39 U.S.C. § 601(a).

<sup>11</sup> In pertinent part, 39 C.F.R. § 320.6(b) provides:

(1) For letters dispatched within 50 miles of the intended destination, delivery of those dispatched by noon must be complete within 6 hours or by the close of the addressee's normal business hours that day, whichever is later, and delivery of those dispatched after noon and before midnight must be completed by 10 A.M. of the addressee's next business day. The suspension is available only if the value or usefulness of the letter would be lost or greatly diminished if it is not delivered within these time limits. . . .

(2) Letters sent from the 48 contiguous states of the United States or to other nations are deemed "delivered" when they are in the custody of the international or overseas carrier at its last scheduled point of departure from the 48 contiguous states. (Emphasis added)

- (2) the "cost" test, which requires that the sender demonstrate the urgency of the letter by paying a substantial premium over regular postal rates.<sup>12</sup>

Under the "cost" test, Postal Service regulations allow carriers to make the comparison with Postal Service rates based on an entire shipment of letters if all the letters are "delivered" to the same destination:

If a single shipment consists of a number of letters that are picked up together and *delivered together to a single destination*, the applicable U.S. postage may be computed for purposes of this paragraph as though the shipment constituted a single letter of the weight of the shipment. (Emphasis added)

39 C.F.R. § 320.6(c). The definition of "delivered" is the crux of the ambiguity that has permitted remailers to flourish by using airmail shipments as "urgent" deliveries of arguably "non-urgent" individual letter items.

For purposes of the suspension of the Private Express Statutes for extremely urgent international mail, the regulations consider letters to be "'delivered' when they are in the custody of the international or overseas carrier at its last scheduled point of departure from the 48 contiguous states." 39 C.F.R. § 320.6(b)(2). The remailers contend that under the current regulations, even though mail is ultimately destined for a number of different foreign addressees, it is deemed "delivered" when the bundle of consolidated letters arrives at the overseas carrier. Under that reading of the regulations, shipments so delivered meet the cost test if the carrier charges twice the

<sup>12</sup> In pertinent part, 39 C.F.R. § 320.6(c) provides:

It will be conclusively presumed that a letter is extremely urgent and is covered by the suspension if the amount paid for private carriage of the letter is at least three dollars or twice the applicable U.S. postage for First-Class Mail (including priority mail) whichever is the greater.

domestic First Class rate based on the aggregate weight of each shipment. By treating the consolidated package as a single letter whose postage is determined by the weight of the entire package, remailers can satisfy the cost test and charge a lower rate than if the postage payable were calculated separately for each piece of mail in the package addressed to a different addressee.<sup>13</sup> The Postal Service argues that this practice of the remailers is inconsistent with both the intent and terms of the suspension for extremely urgent mail and proposes revising the regulations to make it clear that the carriers' current practices are prohibited by the Private Express Statutes. Notice, 50 Fed. Reg. at 41,462.

### C. Summary of Proposed Regulations

The Postal Service proposes three changes in its regulations to reduce ambiguity in the definition of extremely urgent mail. The first amendment construes the Postal Service monopoly over letter carriage to include international mail by providing "explicit notice that carriage of letters over post routes within the United States in the course of shipment to or from another country, as well as carriage that begins and ends within the United States" is governed by the statutes. 50 Fed. Reg. at 41,462. This change is made by inserting the term "within the United States" to the existing provision of 39 C.F.R. § 310.1(d).<sup>14</sup>

The second change alters the definition of extremely urgent international mail. The proposed regulations would eliminate application of the "loss of value" test to international mail, by

<sup>13</sup> 50 Fed. Reg. at 41,463 ("... postage for first class mail is based on one-ounce increments of weight. Few letters weigh exactly one ounce, and if several are weighed together the total will be fewer ounces than the sum of the individual letters counted as one each ... [thus] reducing the amount that the carrier must charge to satisfy the twice-the-postage element of the test.").

<sup>14</sup> Section 310.1(d), as modified, would state: "Post routes are routes on which mail is carried by the Postal Service *within the United States*. ..." 50 Fed. Reg. at 41,464 (emphasis on proposed change).

deleting the "delivered" language of 39 C.F.R. § 320.6(b).<sup>15</sup> International letters would be considered "extremely urgent" only if the price charged were great enough to meet the "cost" test.<sup>16</sup>

The third revision would restrict application of the cost test by clarifying the definition of "destination." The new regulation would define "destination" as the ultimate addressee of an individual letter, rather than the international carrier that receives the bundle of letters. As a result of this proposed change, a carrier would not be able to calculate the minimum charge for an entire shipment of letters but would be required to calculate the charge for each piece sent to a different addressee. This change is intended to eliminate or significantly to lessen the private carriage of international mail by raising the minimum price that a private carrier must charge to qualify under the "cost" test.<sup>17</sup>

### III. DISCUSSION

#### A. It is Not Clear that Congress Intended to Grant the Postal Service a Monopoly over International Mail

A number of factors raise doubt as to whether Congress intended to extend the Postal Service monopoly to international mail. In the first instance, the plain language of the Private Express Statutes grants the Postal Service a monopoly over domestic carriage.<sup>18</sup> With respect to an international monopoly, the statutes are silent. Given the national economic policy of fostering competition, the courts will require a clear expression

<sup>15</sup> See *supra* note 11.

<sup>16</sup> 50 Fed. Reg. at 41,463-64.

<sup>17</sup> *Id.*

<sup>18</sup> The Postal Service has relied on the prohibition against private carriage of letters over domestic routes to claim a similar monopoly over mail sent abroad. See, e.g., Op. Gen. Counsel Postal Serv. PES 83-3 (1983) ("[T]he Private Express Statutes apply to those portions of 'air routes in operation'

of a congressional intent to create a monopoly, or otherwise restrict competition.<sup>19</sup> Unless, it were necessary to give the Postal Service a monopoly over international mail in order to effectuate some domestic policy goal, like "universal service," the courts would not impute to Congress an intent to create a monopoly over international mail. As we indicate in Section B.2, *infra*, there is no evidence that granting the Postal Service a monopoly over international mail is necessary in order to provide domestic universal service or any other domestic goal of Congress.

which are partially as well as wholly within the United States. Therefore, the Private Express Statutes and regulations are applicable to the carriage of letters which are sent from the United States to other countries. . . .").

We are, of course, aware that courts "give great deference to the interpretation given a statute by the agency charged with its administration." *National Association of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570, 595 n.110 (D.C. Cir. 1979) ("*NAGCP I*"), *rev'd on other grounds*, 103 S.Ct. 2717 (1983). On the other hand, courts have reversed an administrative agency's construction of its statute as impermissible where it is not "sufficiently reasonable." See *FAIC Securities, Inc. v. United States*, No. 84-5408, slip op. at 16 (D.C. Cir. 1985). Indeed, courts have reversed the Postal Service's construction of the Postal Reorganization Act on several occasions. See, e.g., *Time, Inc. v. United States Postal Service*, 685 F.2d 760, 771 (2d Cir. 1982) (Postal Service construction rejected as simplistic and inconsistent with structure of Act); *NAGCP I*, *supra*, at 595-598 (Postal Service construction found too "curious" and "narrow" to prevail over common sense reading of Act); *United Parcel Service v. United States Postal Service*, 604 F.2d 1370, 1381 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

<sup>19</sup> See, e.g., *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) (exemptions from antitrust laws strictly construed); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973) ("[C]ourts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws"); *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967) (immunity from antitrust laws is not lightly implied); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51, (1963) (repeals of antitrust laws by implications from regulatory statute strongly disfavored and found only where plain repugnan-

The different rate regulatory mechanisms that Congress has established for domestic and foreign mail also support the view that Congress did not intend to confer on the Postal Service a monopoly over international mail. In enacting the Postal Reorganization Act, Congress established a complex regulatory scheme which the Governors of the Postal Service manage its affairs while the independent Postal Rate Commission reviews and recommends postal service classifications and rates.<sup>20</sup> The Governors may establish postal rates only after the Postal Rate Commission reviews a rate request submitted by the Postal Service.<sup>21</sup>

cy exists between antitrust and regulatory provisions); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (*per se* violation of antitrust laws not exempt where statute gave defendant duty of self-regulation, but regulation by SEC not sufficiently pervasive); *United States v. Radio Corp. of America*, 358 U.S. 334, 350 (1959) (anticompetitive conduct not exempt from antitrust laws where regulatory scheme not sufficiently pervasive); *Woods Exploration and Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1302 (5th Cir. 1971) ("Our antitrust laws constitute our economic magna carta, designed to protect against predatory oppression. Conceived as such a writ they must not be facilely negated.").

<sup>20</sup> See *Governors of the United States Postal Service v. United States Postal Rate Comm'n*, 654 F.2d 108, 114 (D.C. Cir. 1981); *United Parcel Service v. United States Postal Service*, 604 F.2d 1370, 1373 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). See generally 39 U.S.C. §§ 3601-3628; House Comm. on Post Office and Civil Service Commission, H.R. Rep. No. 91-1363, 91st Cong. 2nd Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 3649, 3658-3660, 3663-3669 ("House Report").

<sup>21</sup> The Commission, typically after a hearing on the record, transmits a recommended decision to the Governors on changes in postal rates based on specifically enumerated statutory considerations. These criteria include the following:

(1) the establishment of a fair and equitable schedule;

\* \* \*

(4) the effect of rate increases upon . . . business, mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

In enacting this "carefully constructed system of checks and balances between governmental agencies,"<sup>22</sup> the courts have reasoned that "Congress intended to prevent undue imposition on users of monopolized classes. . . ."<sup>23</sup> The legislative history graphically demonstrates the Congressional concern that, in the absence of oversight by the Postal Rate Commission, the Postal Service could abuse its monopoly over First Class mail:

The temptation to resolve the financial problems of the Post Office by charging the lion's share of all operational costs to first class is strong; that's where the big money is. The necessity for preventing that imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management.<sup>24</sup>

Congress did not express a similar concern for regulating the rates charged by the Postal Service for international mail. Indeed, the Postal Service interprets the Postal Reorganization Act as not providing any Postal Rate Commission jurisdiction over international service classifications and rates.<sup>25</sup>

\* \* \*

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs.

39 U.S.C. § 3622(b). The Act also places strict procedural restrictions on the Governors' authority to establish a rates different from those recommended by the Commission. See 39 U.S.C. § 3625.

<sup>22</sup> *Governors v. Postal Rate Comm'n*, 654 F.2d at 116.

<sup>23</sup> *National Association of Greeting Card Publishers v. United States Postal Service*, 103 S.Ct. 2717, 2730, n.10 (1983).

<sup>24</sup> S. Rep. No. 91-912, 91st Cong., 2d Sess. at 13 (1970).

<sup>25</sup> See *International Mail*, *supra*, at 8. Compare 39 U.S.C. § 407 with 39 U.S.C. § 3622. Pursuant to its authority under Section 407 to conclude international Universal Postal Union, an organization of foreign postal

The freedom Congress allowed the Postal Service in setting international rates is inconsistent with the view that Congress intended to confer monopoly status on the Postal Service with respect to international mail. In establishing domestic rate regulatory authority in the independent Postal Rate Commission, Congress expressed a policy choice to protect users of the Postal Service from unfettered pricing by a lawful monopolist.<sup>26</sup> There is neither evidence nor reason to believe that Congress would have been less solicitous of U.S. users of international mail if it had intended to confer a Postal Service monopoly over international mail. In fact, we are unaware of any situation in which Congress has created a legal monopoly without providing for rate regulation to protect the public from abuse of the monopoly power. In this case, the Postal Service cannot assert, as a necessary adjunct to its domestic monopoly and in order to raise revenue, that its international services are to be free from both the rigors of the market place and regulation by the Postal Rate Commission. Courts simply would not be likely to ascribe such an unprecedented approach to Congress.

In sum, we believe that the scope of the Postal Service monopoly is sufficiently unclear to call into question the Postal Service's authority to adopt the proposed regulations. We recognize the temptation faced by the Postal Service to assert the authority to construe broadly the scope of its monopoly and thereby protect itself from revenue loss, irrespective of the size or import of such loss. Where, however, the underlying

monopolies that, *inter alia*, establishes the "base" rate for various weight categories of international mail. See generally Article 19, Universal Postal Convention, October 26, 1979, T.I.A.S. No. 9972 ("1979 Convention"). This base rate, as a practical matter, places virtually no restriction on the Postal Service, since UPU members may set the actual charge for international mail originating in their own countries anywhere from 70 percent below to 100 percent above the base rate. *Id.* Member countries are also authorized to add additional surcharges for conveyance by air. *Id.* at Arts. 69, 70.

<sup>26</sup> See note 24, *supra*.

statutory authority is as "obscure" as it is here, and a broadened monopoly would adversely effect consumer interests, Congress, not the Postal Service is the appropriate body to determine the scope of the Postal Service's monopoly and authority.<sup>27</sup>

**B. The Public Interest Would Best be Served by Permitting Competition from International Remailers**

**1. Competition from the Private Sector Will Benefit Consumers of International Postal Service**

The Postal Service, like any monopolist, has the ability and incentive to charge supracompetitive rates for its monopoly services. As discussed above, there are apparently no effective regulatory restraints being imposed on Postal Service classifications and rates for international mail. Entry by remailers has provided the only incentive for the Postal Service to price its international services competitively. In response to entry by remailers, moreover, the Postal Service is now also in competition with other postal administrations.<sup>28</sup>

<sup>27</sup> See *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d at 827, n.10. The dissenting judge, with whom the majority agreed concerning the importance of Congressional attention to ambiguities in the scope of the postal monopoly, opined:

[T]he desired scope of the Postal Service's monopoly is entirely a question of public policy, properly to be determined solely by Congress, and this court should not countenance the Postal Service's power and revenue grabbing simply because the statute, the statutory history, and the agency's own administrative interpretations are conflicting and obscure.

*Id.* at 831 (Judge Wilkey, dissenting).

<sup>28</sup> Mail may pass through a number of different countries on its way to the ultimate addressee. Countries through which the mail passes on part of the journey are compensated through the payment of "transmit fees" by the originating country. The postal administration that delivers the letter to the ultimate addressee is compensated by the payment of "terminal dues." The

Consumers of international postal services have benefited greatly from the competition provided by private international carriers. Competition in this market has provided consumers with several significant benefits. It has placed downward pressure on price, and provided a strong incentive for firms to provide efficient and innovative service. A derivative benefit is that businesses using lower-cost, more efficient international postal competitors can use these benefits to become more effective competitors themselves in international markets.

Apparently, private firms doing business abroad have not been satisfied with the international service provided by the Postal Service. A group of First Class mailers recently wrote to the Postal Service that the ability of their firms to compete with foreign companies is hurt by the "unreliable and at times erratic nature of delivery for international mail. . . . This jeopardizes business opportunities for American companies trying to sell goods and services abroad."<sup>29</sup> Indeed, Postal Service officials

Postal Service reported that in 1984 transit revenue accounted for approximately 13.6 percent of total revenue from international mail. Programs such as SAL and I-SAL can be profitable because a postal administration earns the difference between its rates and the various incidental charges such as terminal due and transit fees. Remailers have forced postal administrations to compete with one another by lowering rates and improving service in an effort to attract this lucrative remail business.

The Universal Postal Union ("UPU"), in response to this competition, has instituted regulations that can be viewed as an attempt to enforce an international postal cartel. The foundation supporting the UPU is the agreement of its members to allow "freedom of transit" for mail originating in other countries. Article 1, 1979 Convention. Under Article 23.4 of the Convention, however, members may refuse transit of mail originating in a member country but posted abroad. The Department has been made aware of a number of instances where the Postal Service has relied on Article 23 in delaying passage of mail originated by U.S. companies that was posted in foreign countries by remailers.

<sup>29</sup> Letter from Laurel Kamen (American Express Corp.), Richard Coughenour (Citicorp) and Rolf Wetjen (Shearson American Express Corp.)

have acknowledged that the Postal Service's performance in international mail has been inadequate. For example, Walter Duka, Assistant Postmaster General for International Postal Affairs, stated at a recent meeting of the Board of Governors that the Postal Service has taken a number of measures to "try and get international mail back on a healthy track," and noted that the purpose of these measures is to "match the delivery claims made by the so-called remailing companies."<sup>30</sup> Indeed, the Postal Service did not even offer I-SAL service until it began to lose substantial amounts of international business. According to Mr. Duka:

[I]nternational mail operates in a very competitive environment. We certainly realize that we've experienced significant volume losses and that we must make our offerings more competitive.<sup>31</sup>

The difference in price between services provided by the Postal Service and those of remailers is quite substantial. According to recent reports, some remailers charge as much as 35 percent less than the Postal Service and provide better service. As a result, private carriers have taken "nearly all of the international market for airlifted printed matter."<sup>32</sup>

Competition from remailers also has the salutary effect of providing additional incentives for the Postal Service to provide innovative service and to increase operating efficiencies. Mr.

to Postmaster General Pual N. Carlin, quoted in "Erratic Service Hurting International Firms," *Business Mailers Review*, May 27, 1985.

<sup>30</sup> W. Duka, Remarks at Meeting of the Board of Governors, United States Postal Service 47 (September 6, 1985) ("Duka Remarks").

<sup>31</sup> *Id.* at 48. See also "Price Cutting Looms for International Mail," *Business Mailers Review*, Sept. 9, 1985; "Faster Foreign Mail Service Promised," *Business Mailers Review*, June 24, 1985; "A Response to Competition in Foreign Mail," *Business Mailers Review*, July 22, 1985.

<sup>32</sup> See "Price Cutting Looms for International Mail," *Business Mailers Review*, Sept. 9, 1985.

Duka's response to a question by Governor Voss leaves little doubt that remailers provide an important competitive check on the exercise of market power by the Postal Service over international mail services.

[W]e are coming too late, I think, to try to apply some imagination and creativity and try to be more competitive with these private firms and I certainly agree with you that we should have been out ahead of them in providing better service before *they in effect have forced us to do this*.<sup>33</sup>

2. There is No Evidence that the Policies Underlying the Domestic Postal Monopoly Will be Jeopardized by International Remail Competition

A significant Congressional policy underlying the Postal Reorganization Act is that of "universal service":

The Postal Service is required to develop and provide adequate and efficient postal service at fair and reasonable rates and to serve as nearly as practicable the entire population of the United States. . . . [E]ffective postal service is to be assured to residents of rural, as well as urban, communities.<sup>34</sup>

It has been argued that the domestic monopoly created by the Private Express Statutes is necessary in order to support this universal service policy, i.e., that unless private entrepreneurs are prevented from "cream skimming" the more lucrative, high density markets, the cost of providing postal services to all users will effectively deny service to some users.

<sup>33</sup> Duka Remarks at 52 (emphasis added).

<sup>34</sup> See House Report, *supra*, 1970 U.S. Code Cong. Ad. News at 3657 (1970).

In general, we believe that these arguments are unsound as a matter of economic policy and do not justify the Private Express Statutes. Rather, it has been our position that the Private Express Statutes represent a historic deviation from this nation's traditional reliance on the private sector, rather than on the government, to provide services that the public demands. We have observed elsewhere that the Postal Service's domestic monopoly, coupled with the uniform rate structure mandated by the Postal Reorganization Act, "may impede or preclude some transactions that are cost justified and at the same time encourage other transactions involving the mail for which equally good or better lower cost substitutes are available."<sup>35</sup>

Assuming, nonetheless, that a connection can be made between universal service and a statutory domestic monopoly, we do not believe that curtailing competition from international remailers is necessary to further the policies underlying the Private Express Statutes. The Postal Service, noting that the Private Express Statutes are "a revenue protection measure,"

<sup>35</sup> Testimony of Assistant Attorney General William F. Baxter before the Subcommittee on Governmental Information, Justice and Agriculture of the House Committee on Government Operations at 8 (May 4, 1983). See generally, U.S. Department of Justice, "Changing the Private Express Laws: Competitive Alternatives and the U.S. Postal Service" (January 1977).

While it may be true that a single postal firm might serve certain rural low density markets most efficiently, the market for inter-city delivery of mail appears to be capable of serving a number of competing firms. The result, under the Private Express Statutes is that low-cost users of the mail subsidize high-cost users. Rather than the hidden subsidy engendered by the present scheme, Congress might explicitly subsidize these high-cost users. From all indications, international mail, like inter-city mail, is not a natural monopoly. Thus, a number of firms competing with each other could most efficiently provide international postal services, and avoid the inefficiencies associated with a system of hidden subsidies. Similarly, a direct subsidy to high-cost users would address more efficiently any concern that such competition would undermine universal service by denying local delivery a subsidy from international postal services.

argues that the private carriage of international mail "altogether bypasses the United States Mails."<sup>36</sup> It provides no evidence, however, that would indicate that competition from international carriers is causing it economic harm, let alone such great harm as to jeopardize its ability to provide universal service.

In an analogous situation, this Administration recently authorized, and the Federal Communications Commission approved, limited competition to the INTELSAT international satellite monopoly<sup>37</sup> in the form of customized business services roughly analogous to the customized mail services provided by remailers. The decision was based on the conclusion that the benefits of competition in the provision of specialized telecommunication services outweighed any risk to universal service. Under circumstances similar to those present here, the Administration determined that entry by U.S. firms would give customers of satellite services "new service options

<sup>36</sup> Notice, 50 Fed. Reg. at 41,462.

<sup>37</sup> INTELSAT is an acronym for the International Telecommunications Satellite Organization, a multinational organization that owns and manages the global public telecommunications satellite system. According to a recent report, INTELSAT "handles about 2/3 of the world's transoceanic telecommunications traffic and most international television transmissions." See Senior Interagency Group on International Communications and Information Policy, "A White Paper on New International Satellite Systems" at 7 (Feb. 1985) ("White Paper"). Under the Satellite Act of 1962, the President must determine the international satellite systems "separate" from INTELSAT are "required in the national interest" before the FCC may authorize such systems under the Communications Act of 1934. See 47 U.S.C. § 721(a)(6). Under the multilateral treaty covering INTELSAT, signatories may authorize private satellite facilities for "international public telecommunications service requirements" where those facilities are coordinated with INTELSAT to ensure technical compatibility and the avoidance of economic harm to INTELSAT. See INTELSAT Intergovernmental Agreement, Article XIV, Aug. 20, 1971, 23 U.S.T. 3813, 3853, TIAS No. 7532. See generally FCC Report and Order in Docket No. 84-1299 at 45 (Sept. 3, 1985.).

and benefits of competition."<sup>38</sup> The Administration also contemplated that competition would engender responsive innovation by INTELSAT itself. In conclusion, the Administration recognized:

Governments should not strifle private entrepreneurial initiatives absent sound and compelling public policy reasons. Such incentives should not be discouraged when the services proposed could prove of value to customers, improve their productivity and efficiency, and thus enable American firms to compete more effectively at home and abroad.

White Paper at 50.

We do not believe that the Postal Service has provided sound and compelling public policy reasons that warrant its attempt to eliminate competition in the market for international mail services. Remailers provide specialized bulk mail services to large business mailers. The Postal Service is free to compete for that business, and if forced to innovate, may do well in attracting such business. In any event, the Postal Service provides no evidence that existing private competition from remailers providing specialized international services has had any financial impact on it of a magnitude that jeopardizes its ability to provide universal service. To stifle such competition in the absence of compelling policy reasons would be contrary to the public interest.

## V. CONCLUSION

For the reasons set forth above, we believe that adoption of the proposed regulations would stifle lawful competition to the Postal Service. The Postal Service's authority to expand its domestic monopoly to eliminate international competition from

<sup>38</sup> See White Paper at 2. In its report and order the FCC made detailed findings as to the public benefits that flow from private international satellite systems. See FCC Report and Order at 34-45; White Paper at 50.

remailers is far from certain, and consequently, requires Congressional clarification. Weighed against this uncertain legal authority, is the certain public benefit that accrues from private sector competition in the provision of international postal services. In these circumstances, the public interest would be poorly served by amendment of the Postal Service's regulations to prohibit a specialized form of remailer competition in the provision of international mail services.

Respectfully submitted,

Douglas H. Ginsburg  
Assistant Attorney General  
Antitrust Division

Charles F. Rule  
Deputy Assistant Attorney General  
Antitrust Division

Barry Grossman, Chief  
Communications & Finance Section  
Robert E. Hauberg, Jr.  
Assistant Chief  
Communications & Finance  
Martin L. Stern, Attorney  
Communications & Finance Section  
Jonathan M. Rich, Attorney  
Communications & Finance Section  
Michael A. Williams, Economist  
Economic Regulatory Section  
Antitrust Division  
U.S. Department of Justice  
504 Safeway Building  
Washington, D.C. 20530  
202/724-6693

December 12, 1985

January 23, 1986

The Honorable John McKean, Chair  
USPS/Board of Governors  
One California Street, Suite 1200  
San Francisco, CA 94111

Dear Mr. McKean:

Last year we wrote to then Postmaster General Carlin in regard to the U.S. Postal Service's (USPS) proposed rule changes in the regulation on the restrictions on private carriage of letters. In that letter, we asked that the USPS extend the comment period from thirty days to sixty days, so the Subcommittee could carefully review the proposed changes and the impact on the USPS and the customers of international remailing services. The extension was granted and the Subcommittee has now had the opportunity to review the matter.

We also asked the USPS to provide us with answers to several questions. The most important of which were, how much volume and revenue is involved and how the public would benefit. The only answer they could provide regarding our question on volume and revenue was, "it is common knowledge...that a number of shippers and carriers engaged in this practice, and we infer from this and other information that the volumes and revenues involved are significant". Concerns about the needs of current users of these services were not even addressed by the USPS.

We cannot understand how the USPS could undertake an action of this kind without even being able to give a rough estimate of the volume and dollars involved, or without knowing the effects of this proposal on current users of remailing services. Further, the Subcommittee learned that of the fifty-seven comments received on the proposed regulation changes, fifty-five of them opposed the USPS proposed action.

In its comments, the Department of Justice (DOJ) stated, "we believe that adoption of the proposed regulations would stifle lawful competition to the Postal Service. The Postal Service's authority to expand its domestic monopoly to eliminate international competition from remailers is far from certain, and consequently, requires Congressional clarification. Weighed against this uncertain legal authority, is the certain public benefit that accrues from private sector competition in the provision of international postal services. In these circumstances, the public interest would be poorly served by amendments of the Postal Service's regulations to prohibit a specialized form of remailer competition in the provision of international mail service."

Accordingly, the Subcommittee finds no justification or basis for the action proposed by the USPS. However, we have instructed the Subcommittee staff to continue studying the matter in more depth to determine if any clarification is necessary. We will, of course, keep you informed of our findings.

Sincerely,

MICKEY LELAND  
Chairman

FRANK HORTON  
Ranking Minority Member

ROBERT GARCIA  
Member

cc: The Honorable William D. Ford, Chairman  
House Committee on Post Office & Civil  
& Service and Members of the Committee

26 February, 1986

The Honorable Albert V. Casey  
Postmaster General  
United States Postal Service  
475 L'Enfant Plaza, S.W., Room 10022  
Washington, D.C. 20260-1000

Dear Mr. Postmaster:

I understand that on 3 March 1986, the Board of Governors of the United States Postal Service will consider proposed rules that, if adopted, will materially and adversely affect the ability of remail services to compete for international mail traffic. Our Antitrust Division filed comments with you on 12 December 1985, opposing these proposed rules. I would like to reiterate the concerns of this Department about the effect of the proposed rules on competition and consumer welfare.

As the Antitrust Division has explained, there are significant public benefits from lawful private sector competition in the provision of international postal services. Remailers have been able to offer service to United States businesses competing abroad at costs and terms that are apparently viewed by users as better than those offered by the Postal Service. I understand that competition from remailers has forced the Postal service to introduce new international services. By stifling lawful private sector competition, the proposed regulations will undermine economic efficiency and will inhibit Postal Service incentives to innovate and to price its international services competitively — all to the detriment of consumer welfare.

Given the Administration's policy in favor of competition and against unnecessary regulation, I urge you to follow the recommendation filed by our Antitrust Division and not promulgate the proposed rules. I understand that these same issues will be relevant to Administration review of the 1984 Universal

Postal Union Convention, and I hope the Convention will be submitted shortly for Administration review. By copy of this letter, I am informing the remaining members of the Board of our position on this matter.

Sincerely,

EDWIN MEESE III  
Attorney General

cc: Members of the Board of Governors,  
United States Postal Service

28 February 1986

Honorable Albert V. Casey  
Postmaster General  
U.S. Postal Service Headquarters  
Washington, D.C. 20260-1000

Dear Mr. Casey:

The Board of Governors of the Postal Service will consider the issue of international remain at its March 3 meeting. The United States Postal Service (USPS), in an October 10, 1985, *Federal Register* notice, proposes to restrict private companies from providing international remail service. The Department of Commerce opposes this proposal. I urge you not to adopt it.

The proposal to restrict international remail service should be put aside on the basis of business' expressed needs and U.S. trade policy. U.S. businesses use the services of private companies for remail because their service is less expensive and faster than the alternative being developed by USPS. International remail service provides a valuable service for U.S. international business firms. To prohibit U.S. companies from using these services would place the firms at a disadvantage vis-a-vis our foreign competitors.

In addition, the U.S. international business community overwhelmingly opposes the USPS proposal. This is borne out by the comments received by USPS following its *Federal Register* notice as well as a poll commissioned by the International Remail Committee.

Please let me know if you would like further information.

Sincerely,

Malcolm Baldrige  
Secretary of Commerce

28 February 1986

Honorable Albert V. Casey  
Postmaster General  
U.S. Postal Service  
475 L'Enfant Plaza, S.W., Room 10022  
Washington, DC 20260-1000

Dear Mr. Casey:

On October 10, 1985, the U.S. Postal Service (USPS) proposed a revision in its regulations implementing the Private Express Statutes that would have the effect of restricting the operations of international "remailers." We understand the USPS Board of Governors plans to consider this proposal on March 3, 1986.

The Office of Management and Budget recommends that the Board not adopt the proposed revisions. We believe the revisions would restrict competition in international mail service, because international remailers would be unable to offer many, if not all, of their current services. Competition from international remailers has increased innovation and improved service levels in this market. The Department of Justice has found that private international remailers currently provide faster service to more countries, typically at lower rates, than does the competitive program offered by the USPS. The proposed changes would harm consumers of international mail services by increasing their costs and reducing the quality and variety of international mail services available to them. Since most of the users of international remailers' services are U.S. firms with international activities, this action would also reduce U.S. competitiveness abroad.

We are concerned that if the proposed changes are adopted, consumers of international mail services will not be protected either by competition or by regulation. Unlike domestic mail rates, rates for international mail are not subject to regulation by the Postal Rate Commission.

The rationale presented by the USPS for the proposed rule is that current practices deprive the USPS of revenue. We do not believe this is an adequate justification for extending the USPS monopoly, for it would permit no limits to extending that monopoly to any form of service where the USPS faces competition. It is the policy of this Administration to foster competition wherever possible, because of the benefits it produces for consumers. We believe that the USPS should also be seeking feasible opportunities to promote competition, within its statutory authority and obligations.

On a related matter, we are seriously concerned about the USPS's delay in submitting the 1984 Universal Postal Union Convention to the State Department. Delay in sending the treaty forward can impede the ability of the President to exercise his Constitutional and statutory discretion to oversee the foreign affairs of the United States and may cast doubt on our resolve to act expeditiously in fulfilling our international responsibilities.

Sincerely yours,

James C. Miller III  
Director

2 April 1986

Honorable Alfonse D'Amato  
United States Senate  
Washington, D.D. 20510

Dear Senator D'Amato:

I am writing in response to your February 13, 1986 letter to Attorney General Meese. Your letter seeks written confirmation from the Department of Justice that international remailers "are not acting illegally" under current Postal Service regulations.

I am enclosing for your information a letter from the Attorney General to Postmaster General Casey that indicates our view that remailers currently provide "lawful private sector competition" to the Postal Service. I also enclose a March 4, 1985 Statement of John R. McKean, who is the chairman of the Postal Service Board of Governors. That statement indicates that the Board of Governors views competition from remailers as being in the public interest. That statement also indicates that the Board of Governors has ordered the Postal Service to commence a rulemaking proceeding to "remove the cloud" over remailing that, in their opinion, is created by current Postal Service regulations.

Under these circumstances, you may be assured that the Department of Justice will not seek to prosecute international remailers or their customers on the basis of the current regulations.

We hope that you find this information useful in clarifying the lawfulness of international remail and in minimizing the adverse effects that the current situation has had on your remailer constituents.

Sincerely,

John R. Bolton  
Assistant Attorney General

Enclosures

cc: Louis A. Cox, Esquire  
General Counsel  
U.S. Postal Service  
475 L'Enfant Plaza, S.W.  
Washington, D.C. 20260-1100

## POSTAL SERVICE

### 39 CFR Parts 310 and 320

#### Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rule; Advance Notice of Proposed Rulemaking and Request for Information

AGENCY: Postal Service

ACTION: Withdrawal of proposed rule; advance notice of proposed rulemaking and request for information.

SUMMARY: On October 10, 1985, the Postal Service published in the Federal Register [50 FR 41462] a proposed modification and clarification of the regulations on the Private Express Statutes, with minor and procedural revisions on October 22, 1985 (50 FR 42729) and November 8, 1985 (50 FR 46464). The proposed rule, which is hereby being withdrawn, dealt for the most part with the carriage of international letters by private firms who remail them outside the United States.

The Postal Service received a significant number of comments on the proposed rule. Following review of the comments, the Chairman of the Board of Governors of the Postal Service issued a statement, which is reproduced below. The Chairman noted, among other things, that the remail issue has generated considerable controversy about the proper scope of the Private Express Statutes and implementing regulations. Accordingly, the Chairman announced that a new rulemaking proceeding will be initiated as soon as a factual record is fully developed. The Postal Service has sent a letter to each commenter, a sample of which is reproduced below, requesting information for that record. The principal purpose of this notice is to request the same information from other members of the public.

DATE: Withdrawal of the proposed rule is effective March 20, 1986. Comments and information needed to develop a full and factual record must be received on or before April 30, 1986.

ADDRESS: Written comments and information should be addressed to the General Counsel, Law Department, United States Postal Service, Washington, DC 20260-1113. Copies of all written comments will be available for inspection and photocopying between 9:00 a.m. and 4:00 p.m., Monday through Friday, in Room 5128, 955 L'Enfant Plaza, SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley, (202) 268-2970.

SUPPLEMENTARY INFORMATION: As noted above, the Postal Service is undertaking to develop a factual record in preparation for a new rulemaking proceeding and has sent a letter to each commenter soliciting information for that record. The Postal Service requests the same information from other members of the public. Accordingly, a sample of the letter is reproduced here, along with the Statement of the Chairman of the Board.

### List of Subjects in 39 CFR Parts 310 and 320

Postal Service, Computer technology, Advertising.

W. Allen Sanders,  
*Associate General Counsel, Office of General Law and Administration.*

March 14, 1986.

Dear \_\_\_\_\_: For the reasons more fully discussed in the enclosed statement by John McKean, Chairman of the Board of Governors, the Postal Service is undertaking to gather information and develop a factual record in preparation for the initiation of a new rulemaking proceeding relating to the practice of international remailing. We are writing to you, s a person

who submitted comments in response to our earlier notice of proposed rulemaking on this subject, to solicit information for that record.

The particular focus of our inquiry is the appropriate scope of a new suspension of the Private Express Statutes which may be necessary to serve the interests of our customers. We solicit information from you as to the kind or kinds of private services which in your experience have met, or in your estimation would meet, your needs or the needs of the public, with respect to letters being sent to addressees in foreign countries, more satisfactorily than those provided by the Postal Service. Of greatest value to us in this respect would be information that addresses such points as the following:

- The nature of the correspondence;
- The degree of urgency and the type of harm that would be caused by delay;
- Any differential in promptness of service between letters that are "remailed" and those sent through the Postal Service;
- Whether the correspondence is eligible for private carriage under the current loss-of-value test of the suspension for extremely urgent letters (see 39 CFR 320.6(b), copy attached);
- The extent to which the correspondence is intra-company;
- The extent to which letters privately carried to foreign countries are "remailed" or are delivered to the addressees by private means;
- Any estimate of the volume of letters "remailed" over the past year;
- Any differential in cost between letters privately carried and letters sent through the Postal Service;

- The extent to which considerations of cost rather than speed of delivery determine the choice of carrier for letters sent overseas; and
- The extent to which a suspension for remailing would preserve the benefits of desirable competition between the Postal Service and private companies.

This is by no means an exhaustive list of points that may be material to the development of the full factual record that we need as a basis for proposing a new suspension of the Statutes. We welcome any additional information and urge that it be as factual and specific as possible. We also solicit your views as to the scope of a suspension which will best serve the relevant interests, and we invite you to suggest specific language for an implementing regulation.

We anticipate proceeding in accordance with the following schedule:

April 30, 1966 — Responses due to solicitation of information for factual record.

May 22-23, 1966 — Meeting with interested persons to discuss responses and parameters of proposed suspension.

June 16, 1966 — Publish notice of proposed rulemaking in Federal Register.

July 16, 1966 — Comments due on proposed rule.

August 29, 1966 — Publish notice of final rule.

We ask that you send your response so as to reach me not later than Wednesday, April 30, 1966.

We are withdrawing the earlier proposal in order to avoid uncertainty over its status while this new proceeding is pending. To the extent that the earlier proposal dealt with the suspension for extremely urgent letters on matters other than international remailing, we anticipate initiating a further proposal in the near future.

If you have questions, my telephone number is (202) 268-2970.

Sincerely,

Charles D. Hawley,  
Assistant General Counsel, General  
Administration Law Division, Law Department

Enclosures

### 39 CFR 320.6(b)

(b)(1) For letters dispatched within 50 miles of the intended destination, delivery of those dispatched by noon must be completed within 6 hours or by the close of the addressee's normal business hours that day, whichever is later, and delivery of those dispatched after noon and before midnight must be completed by 10 A.M. of the addressee's next business day. For other letters, delivery must be completed within 12 hours or by noon of the addressee's next business day. The suspension is available only if the value or usefulness of the letter would be lost or greatly diminished if it is not delivered within these time limits. For any part of the shipment of letters to qualify under this paragraph (b), each of the letters must be extremely urgent.

(2) Letters sent from the 49 contiguous states of the United States to other jurisdictions of the United States or to other nations are deemed "delivered" when they are in the custody of the international or overseas carrier at its last scheduled point of departure from the 48 contiguous states. Letters sent from other jurisdictions of the United States or from other nations into the 48 contiguous states are deemed "dispatched" when they are in the custody of the domestic carrier, having been passed by United States Customs, if applicable, at the letters' point of arrival in the 48 contiguous states.

(3) Except as provided in this paragraph (b)(3), the times and time limits specified in paragraph (b)(1) of this section are

not applicable to any locations outside the 48 contiguous states. The times and time limits specified in paragraph (b)(1) are applicable to letters dispatched and delivered wholly within Alaska, Hawaii, Puerto Rico or a territory or possession of the United States. The regulations provided in paragraph (b)(2) relating to the delivery and dispatch of letters are applicable by analogy to letters shipped between these jurisdiction and other nations.

### Statement of John R. McKean, Chairman, United States Postal Services Board of Governors, on Remail Issue

March 4, 1986

As some of you may be aware, the Postal Service recently initiated a rulemaking concerning its regulations under the private Express Statutes. That rulemaking involved the rules bearing on the carriage of international mail by private firms who remail it outside the United States.

In response to this proposed rulemaking, the Postal Service has received a significant number of comments. The Board of Governors has been kept informed of the nature of these comments.

The remail issue has generated considerable controversy about the proper scope of the monopoly under which we operate. It is worth emphasizing that Congress entrusted us with this monopoly not for our own benefit but in order to let us better serve the American people. The critical question raised by this rulemaking is whether enforcement of the monopoly in this context would advance or retard consumer welfare and the interests of this nation.

It is the sense of the Board that private sector competition with the Postal Service in the provision of international remailing services can—and already does—produce significant

benefits for the public. Ultimately, even the Postal Service itself can benefit from this kind of competition.

Many businesses appear to view the private sector alternative as preferable to the service we are providing — preferable in terms of price and service. That tells us something important about the way we are now doing our job in this area. The monopoly was not intended to protect us from having to face up to our own shortcomings. I am glad to say that the competition from private remailers has already spurred us on to improve our own efforts and be more competitive in providing international mail services.

As things now stand, therefore, remail services would appear to advance consumer welfare while at the same time fostering innovation and economic efficiency.

The Board of Governors does not believe that any attempt to suppress this kind of competition would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people. Yet we have to deal with the laws and regulations now on the books. As now drafted, they do not appear to leave room for the lawful operation of international remail services. At the very least there is a serious question on this point.

The Board of Governors believes that the appropriate course of action under these circumstances is to change our regulations to make them conform to sound public policy. Accordingly, we are announcing today that the Postal Service will soon be initiating another rulemaking proceeding, this time to remove the cloud that now hangs over the international remail services and preserve the benefits of desirable competition between the Postal Service and private companies.

The Private Express Statutes permit us to suspend their application when the public interest so requires. Such a suspension must be predicated on a fully developed factual record. The

Postal Service intends to take the steps necessary to gather information in this regard and proceed with a new rulemaking as quickly as possible.

[FR Doc. 86-6107 Filed 3-20-86; 8:45 am]

Billing Code 7790-13-

March 26, 1986

The Honorable John McKean, Chairman  
Board of Governors  
United States Postal Service  
475 L'Enfant Plaza, S.W.  
Washington, D. C. 20260

Dear Mr. McKean:

I was extremely disturbed by the letter dated March 14, 1986 by an Assistant General Counsel of the USPS in which he couched the Remailing Issue *in terms of a suspension of the Private Express Statutes*. As you are well aware and as the author of the March 14, 1986 letter should be aware, the Remailing Issue does not, in any way, involve a suspension of the Private Express Statutes.

As noted in the comments of the U.S. Department of Justice dated December 14, 1984, it is not clear that Congress intended to grant USPS a monopoly over international mail as well as domestic mail. Indeed, applicable canons of statutory interpretation and relevant case law tend to indicate that Congress did not intend for the monopoly to extend to international mail. At best, the intent of Congress on this issue is ambiguous. Until this issue is resolved as a matter of law, the USPS need not and should not even consider suspending the Private Express Statutes.

The regulations originally proposed by the USPS, in effect, extend the monopoly to international mail. This is a wholly improper exercise of the rule making authority of the USPS. The scope of the monopoly is a question of public policy and is to be determined only by Congress. Until Congress makes this determination, the issue of suspending the Private Express Statutes is not even relevant.

We strongly advise both the Board and the USPS not to persist in this misinterpretation of the law and of the Remailing Issue.

Sincerely,

MICKEY LELAND  
Chairman

ML/dl

May 2, 1986

U.S. Department of Justice  
 Antitrust Division  
 Charles D. Hawley, Esquire  
 Assistant General Counsel  
 United States Postal Service  
 475 L'Enfant Plaza, S.W.  
 Washington, D.C. 20260-1100

Re: Restrictions on Private Carriage of Letters;  
 Withdrawal of Proposed Rules; Advance  
 Notice of Proposed Rule-making and Request  
 for Information

Dear Mr. Hawley:

I am writing in response to your March 18, 1986 letter to the Department of Justice ("Department") requesting information that might be considered by the Postal Service in fashioning a suspension of the Private Express Statutes for international remail services. I understand that an identical letter has been sent to all parties that filed comments in the remail rulemaking.<sup>1</sup>

Pursuant to the March 4, 1986 statement by John McKean, Chairman of the Board of Governors of the Postal Service ("McKean Statement"), the Postal Service was ordered to withdraw the previously proposed rules on which we and others commented,<sup>2</sup> and to initiate a new rulemaking to "preserve the

<sup>1</sup>Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rules; Advance Notice of Proposed Rulemaking and Request for Information, 51 Fed. Reg. 9852 (March 21, 1986) ("Notice").

<sup>2</sup>Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters; 50 Fed. Reg. 41462 (October 10, 1985); *See also* Comments of the United States Department of Justice, In the Matter of Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and

benefits of desirable competition between the Postal Service and private companies."<sup>3</sup> The letter and Notice represent that the information requested is needed "as a basis for proposing a new suspension of the [Private Express] Statutes" and solicit "views as to the scope of a suspension which will best serve the relevant interests" and specific language for implementing regulations."<sup>4</sup>

The Department sees no need for a new rule. As the Attorney General has stated, international remail represents "lawful private sector competition to the Postal Service."<sup>5</sup> Moreover, the Department has indicated that it will not prosecute remailers or their customers on the basis of current Postal Service regulations.<sup>6</sup> Under these circumstances, a protracted rulemaking will only serve to raise uncertainty as to the legal status of lawful private sector services that numerous executive agencies and the Board of Governors of the Postal Service find beneficial to consumers.

Furthermore, even if a new rule were necessary to clarify that international remail is lawful, the comments filed in the earlier remail proceeding and the Postal Service's own internal reports provide an ample record on which to base any rule that the Postal Service deems necessary to "remove the cloud" over remail that it sees under current regulations.<sup>7</sup> The information request and the accompanying procedural schedule will only delay resolution of this matter.

of Regulations on Extremely Urgent Letters, December 12, 1985, ("Department Comments").

<sup>3</sup>Notice, 51 Fed. Reg. at 9853.

<sup>4</sup>Notice, 51 Fed. Reg. at 9852.

<sup>5</sup>*See* Letter from Attorney General Edwin Meese to Postmaster General Albert V. Casey, February 26, 1986 (copy attached).

<sup>6</sup>*See* Letter from Assistant Attorney General John R. Bolton to Senator Alfonse D'Amato, April 2, 1986 (copy attached).

<sup>7</sup>*Id.* at 51 Fed. Reg. 9853. *See generally* Department Comments at 19-22.

In sum, the Postal Service's conduct of the remail proceeding may reflect a fundamental reluctance to accept the benefits of marketplace competition, contrary to the expressed mandate of the Board of Governors:

The Board of Governors does not believe that any attempt to suppress this kind of competition would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people.<sup>8</sup>

Consistent with this policy pronouncement, and the policy of this Administration to foster and promote private sector competition in international mail, we strongly urge the Postal Service to abandon the remail proceeding. Alternatively, the Postal Service should resolve the proceeding expeditiously on the basis of the existing record so that the benefits of private sector competition may continue to be enjoyed by consumers on international mail services.

Please include this document in the public file of this proceeding.

Sincerely,

Charles F. Rule  
Deputy Assistant Attorney General  
Antitrust Division

Enclosures

<sup>8</sup>See Notice, 51 Fed. Reg. at 9853. See also Department Comments at 19-22.

## POSTAL SERVICE

### 39 CFR Parts 310 and 320

#### Restrictions on Private Carriage of Letters; Meeting

AGENCY: Postal Service.

ACTION: Notice of public meeting.

SUMMARY: This document provides notice of a public meeting relating to the initiation of a new rulemaking proceeding concerning the Private Express Statutes and the practice of international remailing. All persons desiring to attend the meeting should notify the Postal Service by May 15, 1986.

DATES: 10:00 A.M., Thursday, May 22, 1986 (If necessary, on Friday, May 23, 1986.)

ADDRESS: Conference Room, Room No. 5183, 955 L'Enfant Plaza SW., Washington, DC (The location is subject to change if the number of persons desiring to attend exceeds the capacity of this conference room.)

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley, (202) 268-2970.

SUPPLEMENTARY INFORMATION: The Postal Service intends to hold a public meeting in connection with its undertaking to gather information and develop a factual record in preparation for the initiation of a new rulemaking proceeding concerning the practice of international remailing, as previously announced on March 21, 1986, in the Federal Register (51 FR 9852).

Discussion will focus on comments submitted by interested persons in response to the March 21, 1986 Federal Register notice, the need of the public for international services not met by the Postal Service, and the scope of a proposed suspension of the Private Express Statutes to permit international remailing. However, no decision on the nature or scope of a proposed suspension will be made or announced at this meeting. The

meeting is scheduled for May 22, 1986, at 10:00 a.m., and, if necessary, will reconvene on May 23, 1986. All persons desiring to attend the meeting are asked to notify the Postal Service, at the telephone number listed above, by the close of business on May 15, 1986. If the anticipated seating requirements exceed the capacity of the announced meeting room, a change in the room location will be announced on or before May 19, 1986.

Fred Eggleston,  
Assistant General Counsel, Legislative Division

[FR Doc 86-10556 Filed 5-9-86; 8:45 am]

## POSTAL SERVICE

### 39 CFR Part 320

#### **Restrictions on Private Carriage of Letters; Proposed, Suspension of the Private Express Statutes; International Remailing**

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: On March 21, 1986 the Postal Service published in the Federal Register (51 FR 9852) an advance notice of proposed rulemaking and request for information on which to develop a factual record concerning international remailing, and also withdrew a previously published proposed rule.

The purpose of this document is to propose a new suspension of the Private Express Statutes for international remailing. This suspension would implement the statement of March 4, 1986 by John McKean, Chairman of the Board of Governors, that the cloud should be removed from the practice of international remailing. See 51 FR 9853. The proposed suspension would permit the private uninterrupted carriage of letters from the United States to a foreign country for ultimate delivery outside of the United States.

DATE: Comments must be received on or before July 17, 1986.

ADDRESS: Written comments should be addressed to the General Counsel, Law Department, United States Postal Service, Washington, D.C. 20260-1113. Copies of all written comments will be available for inspection and photocopying between 9:00 AM and 4:00 PM, Monday through Friday, in Room 6147, 475 L'Enfant Plaza, West, SW., Washington, D.C. (until on or about June 23, 1986, the location will be Room 5128, 955 L'Enfant Plaza, SW., Washington, DC.).

**FOR FURTHER INFORMATION CONTACT:** Charles D. Hawley (202) 268-2970.

**SUPPLEMENTARY INFORMATION:** On October 10, 1985, the Postal Service proposed to amend several provisions of the regulations, 39 CFR Parts 310-320, that implement the Private Express Statutes. 50 FR 41462 (1985). The purpose of the proposal for the most part was to clarify the administrative suspension of the Statutes for extremely urgent letters, 39 CFR 320.6, with respect to the practice of international "re-mailing." Private firms, believing themselves to be acting pursuant to this suspension, had begun to carry bulk shipments of letters from American firms, entirely outside the United States Mails, to foreign countries. There the letters, addressed to individuals in countries other than the United States, were deposited with a foreign post office, or "remailed," and delivered to their various addresses as ordinary mail.

The Postal Service had determined in an advisory opinion, 39 CFR 310.6 that the carriage of letters in bulk, under the circumstances characteristic of the remailers' operations, did not comply with the terms of that suspension. Advisory Opinion 83-7 (May 11, 1983). During December 1984, the Postal Service requested the Department of Justice to authorize suit to enjoin the activities of those remailers who were continuing to violate the Private Express Statutes in contravention of the advisory opinion. In August 1985 the Department informed the Postal Service that it declined to do so.

While we do not question the Postal Service's authority to regulate the solely domestic activities of international courier services, our decision is based on the conclusion that the Postal Service's implementing regulations may reasonably be construed to permit the complained of activity.

The effect of this decision was to allow the private carriage of letters that were not extremely urgent under the color of a suspension adopted by the Postal Service for letters that were

extremely urgent. Of perhaps more importance, its effect was to create a significant exception to the Private Express Statutes that had never been approved, or even contemplated, either by Congress, or by the Postal Service in the exercise of its power to suspend the operation of the Statutes, 39 U.S.C. 601(b). To correct this situation and to restore the suspension for extremely urgent letters to its original purpose, the Postal Service in October 1985 proposed the clarifying amendments noted above.

In response to the publication of this notice, the Postal Service received approximately sixty comments, virtually all of them critical of the proposal. Subsequently, John McKean, Chairman of the Board of Governors of the Postal Service, stated on March 4, 1986, that the Postal Service would be initiating a new rulemaking proceeding to remove the cloud of [doubt as to lawfulness] that now hangs over the international remail services and preserve the benefits of desirable competition between the Postal Service and private companies.

As the first step in implementation of this statement, the Postal Service on March 21, 1986, published in the Federal Register a notice withdrawing the October 10, 1985 proposal and soliciting information on the benefits to the public of remailing to become part of a "fully developed factual record" upon which to predicate a new suspension (51 FR 9852). In the hope of further supplementing the record, the Postal Service on May 12, 1986 announced that it would hold a public meeting (51 FR 17366), which was held on May 22, 1986. A transcript of that meeting is included in the record of this rulemaking.

In the related proceedings described above, the Postal Service has heard the views of a great many members of the public and several other Federal agencies on the question of the benefits which the public may receive from the availability of private international remail services. It is clear that the overwhelming majority of those who have commented favor a regulation which permits such services. The reasons which they

advance are several: It is faster, less expensive, more reliable, and more responsive than the air mail service provided by the Postal Service. It is said that American business is better able to compete in foreign markets when service of this nature is available. Competition in the provision of international letter delivery service is also said to be inherently beneficial, both to the customers who use this service and to the Postal Service itself.

Some commenters have also directed criticism against the terms of the proposed amendments. In view of the fact that those proposals have been withdrawn, we think it unnecessary to respond to these criticisms.

#### **Applicability of Private Express Statutes to International Shipments of Letters**

One comment raised the threshold question of the applicability of the Private Express Statutes to international shipments of letters. This is fundamental, of course, because, if the Statutes were not applicable, no suspension or exception would be needed to permit the activities of the remailers. The Postal Service is not persuaded, however, that there is any merit to this comment. It is based on the commenter's views of public policy, but it fails to take into account clear expressions of the intent of Congress to apply the Statutes to letters leaving and entering this country.

This intent can be seen most clearly with respect to two of the statutes which contain provisions relating to the transportation of letters by vessels to and from foreign countries. 18 U.S.C. 1699; 39 U.S.C. 602. The legislative history of the 1952 amendment to 18 U.S.C. 1699 leaves no room for doubt that Congress contemplated the application of the Statutes to letters arriving from foreign countries. See S. Rep. No. 1794, 82d Cong., 2d Sess. June 19, 1952:

Under excising law, no vessel arriving in a given port is allowed to break bulk until all letters on board are delivered to the nearest post office. To illustrate how this works is to take the port of Boston, generally the first call on the North Atlantic route of vessels from Europe. . .

The text of 39 U.S.C. 602(a) relating to outgoing letters is, if anything, even more clear on this point:

#### **§602. Foreign letters out of the mails**

(a) Except as provided in section 601 of this title, the master of a vessel departing from the United States for foreign ports may not receive on board or transport any letter which originated in the United States that-

(1) has not been regularly received from a United States post office. . . .

We continue to adhere, therefore, to our conclusion that the Statutes are applicable to the carriage of international letters within the United States.

A second related point raised by several commenters is that there is no need for action by the Postal Service because other agencies of the Executive Branch, particularly the Department of Justice, have concluded that remailing is lawful under current regulations.

We find no merit in this comment, either. The Postal Service is in the best position to know its own intention when it adopts a suspension. The Advisory Opinions have stated these intentions consistently through the years. Furthermore, the regulation at issue has never been the subject of adjudication, or of an Opinion of the Attorney General. Under these circumstances, we think it was reasonable for Chairman McKean to conclude that a further rulemaking is necessary.

A number of other comments challenge on various grounds the authority of the Postal Service to regulate the private carriage

of letters and, as a carrier of letters, to adopt regulations which, it is said, unfairly handicap competing private firms also engaged, or wishing to engage, in the international carriage of letters. We consider, however, that these comments are not well taken. In adopting the regulations contained in Parts 310-320, Title 39, Code of Federal Regulations, the Postal Service has merely implemented the private Express Statutes. It is these Statutes which limit the private carriage of letters upon which postage has not been paid.

This is not a situation in which the postal Service is imposing regulatory limitations upon an industry which would otherwise conduct its operations free of governmental restraint. The regulations define, interpret, and clarify the Statutes and, in the case of Part 320, relax for specific limited purpose, the restrictions of the Statutes, to provide as lawful basis for private carriage which the Statutes otherwise would not permit. If the postal regulations, and particularly those in Part 320, were not in effect, the result would not be unrestricted private competition with the Postal Service but no lawful private carriage at all, except as allowed by very limited statutory exceptions.

In enacting the Private Express Statutes, Congress has made the policy decision that the revenues of the Postal Service should be protected by restricting the private carriage of letters. The Postal Service is not simply one of several enterprises providing letter delivery services. It is, rather a Government agency which is to be "operated as a basic and fundamental service" for the American people. 39 U.S.C. 101(a). While the Postal Service has endeavored, since the enactment of the Postal Reorganization Act, to operate in conformity with the business practices and management methods of the private sector, it is nonetheless a public entity and as such is not free to disregard Congress decision. Under the circumstances, we conclude that there is no valid basis for suggesting that the Postal Service is unlawfully or unfairly attempting to regulate the private sector.

### **The Public Interest in Remailing**

As we have noted above, the overwhelming majority of the comments on our proposals have favored allowing the remailers to compete with the Postal Service and have advanced a number of reasons for this result. Greater speed of delivery, in comparison with air mail, and its resultant benefits to America's ability to compete in overseas markets is perhaps the most frequently raised point. The record is less than fully factual as to this matter. Two commenters have submitted tables showing a comparison of delivery times for letters sent via the Postal Service and via remailers to various cities in Europe, Asia, Africa, and Latin America. These comparisons almost invariably show remailed items with a shorter delivery time. Little or no explanation is given, however, of the manner in which these tables were compiled, of whether they show average times for more than one remailer, of what period of time or what volume of letters the figures represent, in short, how valid the comparisons are. The figures themselves show wide fluctuations between cities, in the differentials between the Postal Service and remailers and in some instances between times by the same mode to the same city. While the apparently anecdotal character of these tables does not add to their credibility, they may well be the most reliable compilations available on this subject. They are, moreover, consistent with the conclusory statements of a number of other commenters.

On the issue of the need for remailing services to assist in making American business more competitive in the world market, the comments provide little more than conclusions. It seems self-evident that a more prompt and reliable letter delivery service would, to some extent, assist parties to existing or prospective business transactions by facilitating written communication. What is less clear, however, is the extent to which any difference that may exist between air mail and remail is significant in this respect, particularly given the wide fluctua-

tions in the delivery time of remail services which we have noted above. We had sought to obtain information from the public which would permit us to determine whether there is a range of time within which delivery is critical to the success of competitive efforts, but our efforts were not successful. Nonetheless, notwithstanding the imprecision of the data, we think it reasonable to conclude that in general the availability of remail services assists American firms in competing internationally.

As to the cost of remail, we have little factual information about the rates charged by remailers. The comments frequently assert that they are lower and we know from observation of promotional material distributed by remailers that they characteristically advertise rates that are lower than air mail, sometimes simply a percentage of the air mail rates. While many comments assert that speed or reliability, rather than price, is the main incentive for the use of remailers' services, we have no doubt that the remailers as a group charge lower rates than the prevailing rates for the Postal Service's international air mail service.

As with the previous points, the record contains little hard evidence as to either the comparative reliability of remail delivery or of the responsiveness of the remailers to the needs of their customers, save that the collection of letters from customers' locations is a characteristic of remailers services. Other than that, we have only the generalized and conclusory statements of commenters to support these points.

There is little or no reliable information as to the amount of revenues diverted to date by the activities of remailers. Estimates run from about \$25 million to \$500 million annually. One comment to the original proposal concluded that the net revenue loss to the Postal Service was in the neighborhood of \$3 million a year. Without attempting to determine the accuracy of these estimates, we can say that the total amount of revenues of the Postal Service from international mail-much of which is not letters and so is not protected from competition by the

Statutes-was \$882.3 million for the most recently published figures. Annual Report of the Postmaster General, 1985. We conclude that the loss of revenues of what is necessarily a lesser amount is not so adverse to the Postal Service as to outweigh the perceived benefits to the public interest from allowing remailing to continue by virtue of the suspension which follows.

### **Proposed Suspension for International Remailing**

For the reasons given above the Postal Service proposes to amend its regulations by adding a new suspension for international remailing. This new suspension, which would be codified as §320.8 of title 39, Code of Federal Regulations, would suspend the operation of the Statutes

to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

This, we think, fairly summarizes the essential character of remailing. It is intended as a forthright acceptance of that practice as the Postal Service now understands it. It is essential, however, that the terms of the suspension be adhered to in good faith and that the suspension not be broadened by abuse to encompass private carriage under circumstances not contemplated in its adoption.

We particularly invite attention to two provisions of this paragraph. The first is "uninterrupted" as a qualification of allowable carriage. By this we mean simply that to come within the terms of the suspension the carriage of letters from a point within the United States to the point at which they are deposited in a foreign mail stream must be substantially continuous. It is not necessary that they be continuously in the hands of a single carrier, nor is it a violation of the terms of the suspension if they are held for sortation or mixed with letters originated by another sender. They must not, however, be opened, read, or otherwise

used in the course of carriage, nor may they be delivered during carriage to any person not involved in that carriage. To help in explaining the meaning of this qualification, we have included in the text of the proposed regulation two contrasting examples of circumstances in which carriage is and is not interrupted. This qualification does not alter the current practice of remailing. It is intended rather to ensure that the suspension does not serve as a pretext for allowing private carriage of letters from one point to another wholly within the United States.

The second provision to which we particularly invite attention is that which requires that letters carried under the suspension be for ultimate delivery outside the United States. The suspension is not intended for the delivery of letters sent to persons within this country. That would be totally at odds with the revenue protection purposes of the Private Express Statutes and would in no way advance the public interest in improved delivery of letters to foreign locations. As with the requirement that carriage be uninterrupted, this provision is intended to ensure that the suspension not be abused. This provision is reinforced by proposed paragraph (b) which states:

This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

Finally, as was true in the adoption of the suspension for extremely urgent letters, see 39 CFR 320.6(e), the regulation provides in proposed paragraph (c) an administrative sanction which may be brought into play in the event of a violation of the substantive terms of the suspension. This sanction is the revocation of the suspension *as to the particular shipper or carrier* for a period of up to a year. This procedure, which involves an opportunity for a hearing before the Postal Service's Judicial Officer Department, offers a flexible means of enforcement of the limited restrictions which qualify the suspension. They are reasonable and appropriate under the circumstances. In view of

the above considerations, the Postal Service proposes to amend 39 CFR Part 320 as follows:

### List of Subjects in 39 CFR Part 320

Postal Service, Computer technology, Advertising.

### PART 320-SUSPENSION OF THE PRIVATE EXPRESS STATUTES

1. The authority citation for Part 320 is revised to read as set forth below, and the authority citations following all the sections in Part 320 are removed.

Authority 39 U.S.C. 401.404,601-101;18U.S.C. 1693-1699

2. A new §320.8 is added to read as follows:

#### §320.8 Suspension for international remailing.

(a) The operation of 39 U.S.C. 601(a)(1) through (6) and §310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

*Example (1)* The letters to overseas customers of commercial firm A in Chicago are carried by Carrier B to New York where they are delivered to Carrier C for carriage to Europe. Carrier C holds the letters in its distribution center overnight, then sorts them by country of destination and merges them with letters of other firms to those countries before starting the carriage to Europe in the morning. The carriage of firm A's letters is not interrupted. The suspension for international remailing applies to the carriage by Carrier B and by Carrier C.

*Example (2)* The bills addressed to foreign customers of the Chicago branch office of commercial firm D are carried by

Carrier E to New York where they are delivered to the accounting department of firm D's home office. The accounting department uses the information in the bills to prepare its reports of accounts receivable. The bills are then returned to Carrier E which carries them directly to Europe where they are entered into the mails of a foreign country. The carriage of the bills from Chicago to Europe is interrupted in New York by the delivery to firm D's home office. The suspension for international remailing does not apply to the carriage from Chicago to New York. It does apply to the subsequent carriage from New York to Europe.

(b) This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

*Example (1)* A number of promotional letters originated by firm F in Los Angeles are carried by Carrier G to Europe for deposit in the mails of a foreign country. Some of the letters are addressed to persons in Europe, some to persons in the United States. The suspension for international remailing does not apply to the letters addressed to persons in the United States.

(c) Violation by a shipper or carrier of the terms of this suspension is grounds for administrative revocation of the suspension as to such shipper or carrier for a period of one year in a proceeding instituted by the General Counsel in accordance with Part 959 of this chapter.

The failure of a shipper or carrier to cooperate with an authorized inspection or audit conducted by the Postal Inspection Service for the purpose of determining compliance with the terms of this suspension shall be deemed to create a presumption of a violation for the purpose of this paragraph (c) and shall shift to the shipper or carrier the burden of establishing the fact of compliance. Revocation of this suspension as to a shipper or carrier shall in no way limit other actions as to such shipper or carrier to enforce the Private Express Statutes by administrative

proceedings for collection of postage (see §310.5) or by civil or criminal proceedings.

Fred Eggleston,

*Assistant General Counsel, Legislative Division.*

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Before the  
UNITED STATES POSTAL SERVICE  
Washington, D.C. 20260-1113

IN THE MATTER OF:

Restrictions on Private Carriage of Letters; Proposed Suspension of the Private Express Statutes; International Remailing

COMMENTS OF THE UNITED STATES  
DEPARTMENT OF JUSTICE

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July 17, 1986

I. INTRODUCTION AND STATEMENT OF POSITION

By Notice of Proposed Rulemaking,<sup>1</sup> the United States Postal Service has solicited comments on a proposed regulation that expressly would permit international remail. The new rule would suspend the Private Express Statutes to "permit the uninterrupted carriage of letters from the United States to a foreign country for ultimate delivery outside the United States".<sup>2</sup> The Department of Justice "Department" supports the proposed regulation.

In late 1985, the Postal Service proposed a rule to make remail unlawful.<sup>3</sup> The Executive Branch — including the Department<sup>4</sup> — and numerous private parties raised strong

<sup>1</sup> 51 Fed. Reg. 21,929 (June 17, 1986).

<sup>2</sup> 51 Fed. Reg. at 21,929. The Postal Service emphasizes that the new rule would only permit remail if the carriage of mail is "uninterrupted". The rule would allow a remailer to sort mail within the United States and to transfer mail to another carrier for part of the journey. It would not, however, allow a company to intercept letters to amend them or read them before they go overseas. 51 Fed. Reg. at 21,931-21,932. The suspension would not permit remailers to carry letters "out of the mails to any foreign country for subsequent delivery within the United States". *Id.*

<sup>3</sup> 50 Fed. Reg. 41,562 (October 10, 1985).

<sup>4</sup> Comments of the United States Department of Justice Before the United States Postal Service, In the Matter of Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters, December 12, 1985 ("Remail Comments"); Letter from Attorney General Edwin Meese III to Postmaster General Albert V. Casey, February 26, 1986; Letter from Secretary of Commerce Malcolm Baldrige to Postmaster General Albert V. Casey, February 28, 1986; Letter from Office of Management and Budget Director James C. Miller III to Postmaster General Albert V. Casey, February 28, 1986; Letter from Council of Economic Advisers Chairman Beryl W. Sprinkel to Postmaster General Albert V. Casey, February 27, 1986.

objections to that proposal.<sup>5</sup> On March 4, 1986, John McKean, Chairman of the Board of Governors of the Postal Service, declared that the Postal Service would instead promulgate a regulation that would clearly legitimate remail.<sup>6</sup> The instant proposal implements that order.

Before proposing this regulation, the Postal Service solicited information on remail and international mail service.<sup>7</sup> The Department filed comments in that proceeding<sup>8</sup> questioning the need for a new rule in light of the Attorney General's conclusion that remail is "lawful private sector competition to the Postal Service"<sup>9</sup> and the Department's statement that it will not prosecute remailers or their customers' on the basis of current regulations.<sup>10</sup>

In our view, the proposed regulation is based on an ample factual record that demonstrates that competition in international mail is in the public interest. The proposal, in conformance

<sup>5</sup> See, e.g., Comments of the New Postal Policy Council, In the Matter of Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters, December 12, 1985.

<sup>6</sup> Statement of John McKean, Chairman of the Board of Governors of the United States Postal Service, March 4, 1986.

<sup>7</sup> Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rules; Advance Notice of Proposed Rulemaking and Request for Information, 51 Fed. Reg. 9852, 9853 (March 21, 1986).

<sup>8</sup> Letter from Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, to Charles D. Hawley, Assistant General Counsel, United States Postal Service, In the Matter of Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rules; Advance Notice of Proposed Rulemaking and Request for Information, May 2, 1986.

<sup>9</sup> Letter from Attorney General Edwin Meese III to Postmaster General Albert V. Casey, February 26, 1986.

<sup>10</sup> Letter from John R. Bolton, Assistant Attorney General, Office of Legislative Affairs, to Senator Alfonse D'Amato, April 2, 1986.

with Administration policy, unambiguously recognizes the benefits of private sector competition in international mail.<sup>11</sup> Moreover, the adoption of this rule would send a clear signal to mailers and foreign nations that the Postal Service will not interfere with the legitimate private competition in international mail.<sup>12</sup> Accordingly, the Department supports the proposed regulation.

## II. DISCUSSION

A deep-seated tenet of American government is that competition enhances consumer welfare and therefore should be protected and fostered by the government.<sup>13</sup> Even regulated markets function best when competition is encouraged to the

<sup>11</sup> As President Reagan wrote to Postmaster General Casey on May 1, 1986, it is the policy of the Administration to "permit and promote competition in international mail."

<sup>12</sup> The Department continues to question the Postal Service's authority to regulate competition in international mail. See Remail Comments, *supra*, at 12-18. The Postal Service relies on 39 U.S.C. § 602 as the basis for this authority. 51 Fed. Reg. at 21,930. However, by its very terms, Section 602 does not prohibit the conduct of remailers that rely on air transportation. Rather, Section 602 merely "prohibits a vessel from departing from the United States for foreign ports from receiving letters on board except from the Postal Service." 39 U.S.C. § 602 (a). Section 602 is silent as to other forms of conveyance. In contrast, in the Postal Reorganization Act and other parts of the Private Express Statutes, Congress clearly distinguished between "vessels" and other forms of conveyance and employed specific terms to cover other forms of conveyance when it chose to do so.

Our belief that Congress did not intend to confer a monopoly over international mail on the Postal Service is not based solely on the plain meaning of Section 602. Congress' apparent failure to authorize the Postal Rate Commission to review international rates is inconsistent with the view that Congress intended to shelter the Postal Service from competition in international mail. Remail Comments, *supra*, at 16-18. We are aware of no situation in which Congress has conferred a legal monopoly without providing for rate regulation to protect consumers. *Id.* at 17.

<sup>13</sup> See, e.g., R. Bork, *The Antitrust Paradox* 15-49 (1979).

maximum extent consistent with other regulatory goals. Thus, the Supreme Court has often held that regulatory agencies must facilitate competition:

A policy in favor of competition in the laws as applications in a variety of economic affairs. Even where Congress has chosen Government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration.<sup>14</sup>

Fostering competitive markets simply is the most effective way to "improve services and reduce costs to our citizens."<sup>15</sup>

The benefits to consumers fostered by competition among remailers and the Postal Service in international mail amply demonstrate the salutary effects of competition. Many commenters stated that remail service is faster and cheaper than the Postal Service's own international mail service. As the Postal Service recognizes, hard statistical evidence of the superiority of remail is unnecessary. The fact that consumers use remailers is conclusive evidence that they provide a service demanded by the public.<sup>16</sup> Indeed, even if remailers had not captured a

<sup>14</sup> *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 298 (1974). Similarly, the Court wrote in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), that, when an industry is highly regulated, it is especially important that competition not be limited:

[T]hat there are so many direct public controls over unsound competitive practices in the industry refutes the argument that private controls of competition are necessary in the public interest and ought therefore to be immune from scrutiny under the antitrust laws.

*Id.* at 352. See also *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244-46 (1968).

<sup>15</sup> Letter from President Ronald Reagan to Postmaster General Albert V. Casey, May 1, 1986.

<sup>16</sup> Chairman McKean was therefore clearly correct when he stated that remail provides significant benefits to the public. 51 Fed. Reg. at 9853.

significant share of the international mail market, their existence would enhance consumer welfare by spurring the Postal Service to improve services and reduce, prices.

### III. CONCLUSION

The Department of Justice strongly endorses the decision of the Postal Service not to attempt to interfere with the operation of a competitive market in international mail service. As the record in this proceeding has demonstrated, competition in that market has provided, and will continue to provide, significant consumer benefits in terms of price and quality of service. In accordance with that record, numerous judicial pronouncements, and the policies of the Administration, the public interest will best be served by decisions of the Postal Service that promote and foster such private sector competition.

Respectfully submitted,

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July 17, 1986

BEFORE THE  
UNITED STATES POSTAL SERVICE  
WASHINGTON, D.C. 20260 - 1113

IN THE MATTER OF:  
Suspension of the Private Express Statutes  
for International Remailers

COMMENTS OF THE AMERICAN POSTAL  
WORKERS UNION, AFL-CIO, NATIONAL  
ASSOCIATION OF LETTER CARRIERS, AFL-CIO

The American Postal Workers Union, AFL-CIO ("APWU"), is a voluntary incorporated labor organization with approximately 250,000 members, and is the exclusive collective bargaining representative of approximately 250,000 employees of the United States Postal Service ("USPS") in the Clerk, Maintenance, Special Delivery Messenger, and Motor Vehicle Service crafts nationwide. The National Association of Letter Carriers, AFL-CIO ("NALC"), is a voluntary unincorporated labor organization with approximately 280,000 members, and is the exclusive collective bargaining representative of approximately 220,000 employees of the USPS in the City Letter Carrier craft nationwide. APWU and NALC members are directly affected in their employment opportunities, and as members of the public and users of the mails, by encroachments on the Private Express Statutes ("PES").

Remailers are used to send bulk mailings, typically involving such items as bank statements, periodicals, catalogues, and advertisements, but rarely individual correspondence. The remailer ships the mail to a foreign postal administration for deposit in its mailstream, paying foreign postage, but no U.S. postage. The postal administration in which the remailer enters the mail is not necessarily that of the ultimate recipient.

Although all parties agree that this mail letter is in no sense time-sensitive, these companies asserted the right to carry such letters out of the mails under the "extremely urgent letters" suspension of the PES. 39 C.F.R. Sec. 320.6. After the Department of Justice declined to seek injunctive relief, assertedly because the USPS's regulations were ambiguous as they applied to remailers, the USPS served notice on October 10, 1985, of its intent to clarify the rules applying the PES to remailers. 50 FR 41,462. Thereafter, upon orders of John McKean, Chairman of the USPS Board of Governors—in circumstances and for reasons not fully known—on March 21, 1986, the USPS withdrew its proposal and invited comments on the total exemption of remailers from the PES. 55 FR 9852. Now the USPS proposes to promulgate such a rule. 51 FR 21,929. These comments are submitted pursuant to the notice of June 17, 1986, in opposition to the proposed rule.

### I. History of the PES

The modern postal monopoly is said to be the "foundation of the postal system." Priest, *The History of the Postal Monopoly in the United States*, 18 Jour. of Law & Econ. 33-38 (1975) ("Hist."); *Statutes Restricting Private Carriage of Mail and their Administration*, Comm. on P.O. & C.S. Print No. 93-5, 93d Cong., 1st Sess. 55-56 (June 29, 1973) ("1973 Rept."). A monopoly was found in the Articles of Confederation. It was established by the Continental Congress in 1775; and, in 1782, Congress prohibited competition with the Post Office. Considered an important investment in the infrastructure of the new nation, George Washington used this power as a political means of unifying the country by subsidizing service to the South and West in exchange for their support for the national government. In 1792, Congress embarked on a large-scale expansion of postal routes, and greatly increased penalties for violations. By 1794, it was necessary to crack down on carriage of mail by transportation employees. Hist. at 45-55; 1973 Rept. at 57.

In 1825, Congress clarified and tightened the PES. Amendments in 1827, 1836, and 1838 plugged loopholes in them. The rates in effect the subsidization of frontier routes as the country expanded westward. Hist. at 55-56; 1973 Rept. at 57-58.

By 1820, private expresses and messengers had begun to cut into the monopoly, and by 1840, there was widespread abandonment of the government's service. It responded with stricter enforcement of the 1825 and 1827 acts. But court decisions created loopholes in these laws. In 1844-1845, reform of the post office was the "leading public issue of the day." Hist. at 62. The postmaster general declared that "the only method to defeat the private expresses is to enact stricter laws prohibiting private carriage and to impose heavier penalties for violations." *Id.* at 63.

The PES as we know them were drafted by Senator William Merrick of Maryland and passed in 1845, "the only major congressional consideration of the postal monopoly in the nation's history." *Id.* at 65. Congress concluded that (1) the Postal Service could never successfully compete with private expresses; (2) it had a duty to serve rural and frontier areas; (3) cross-subsidization was necessary and desirable; and (4) a monopoly was necessary to cross-subsidization. This law was consciously anti-"free-enterprise," and private expresses were viewed as "selfish" and "predatory." Hist. at 65-66; 1973 Rept. at 58-59. This 1845 law was successful in eliminating the threat to the national postal system. 1973 Rept. at 59. The act has been called "comprehensive" and "airtight." Hist. at 57-58. The last loophole—that for city delivery—was closed in 1863. 1973 Rept. at 59. Free city delivery was established that year, and rural free delivery in 1896. *Id.* at 61.

The various exceptions to the PES were codifications of existing practices. The "special messenger" exception is the oldest, found in the 1972 statute, and the "cargo" exception was

recognized in 1810. 1973 Rept. at 57. Later, private carriage outside the mails was permitted if postage was prepaid and the letters dated and sealed. *Id.* at 59; see 39 U.S.C. sec. 601. In 1879, Congress provided an exception for private carriage of stamped letters being delivered the post office. *Id.*; see 18 U.S.C. sec. 1696(a). "Letters of the carrier" was added in 1909 in recognition of longstanding practice. 1973 Rept. at 59. The PES were put into the criminal code at the time of 1909 codifications. *Id.* In 1934, the "special messenger" exception was limited to carriage of twenty-five letters. Hist. at 67 n.168.

When the Postal Reorganization Act ("PRA") was passed in 1970, Congress ordered the Board of Governors to study whether to continue the PES in their current form. P.L. 91-375, 84 Stat. 719, sec. 7 (Aug. 12, 1970). The Report cited above concluded that they should continue, and that they should be administered in a systematic way through the rulemaking process (at 9-14). It also asserted the right to suspend the PES when public interest so required (at 11), see 39 U.S.C. sec. 601 (b); 39 C.F.R. Part 320.

## II. The Purpose of the PES

The PES have been found to be constitutional. See, e.g., *United States v. Black*, 569 F.2d 1111 (10th Cir.), cert. denied, 435 U.S. 944 (1978). Their purpose is to preserve the USPS's revenue base, and to prevent "cream skimming," i.e., the operation of businesses which are not bound by the USPS's universal service and uniform rate requirements, and which pick and choose among the sources of cheaper, easier, and "cleaner" mail, and thus undersell the USPS's rates. See, e.g., *United States Postal Service v. Brennan*, 574 F.2d 712, 715 (2d Cir. 1978) (quoting *Blackham v. Gresham*, 16 F. 609, 612 (C.C.S.D.N.Y. 1883):

If private agencies can be established [to carry letters and other mail matter] the income of the government may be so reduced that the economy

might demand a discontinuance of the system; and thus the business which it is the right and duty of the government to conduct for the interest of all, and on such terms that all may avail themselves of it with advantage, may be handed over to individuals or corporations who will conduct it with the sole view of making money, and who may find it for, their profit to exclude localities or classes from the benefit of the services.

*Id.* See also 1973 Rept., App. F (1973). The PES is a "revenue law." *United States v. Bromley*, 53 U.S. (12 Harv.) 93, 13 L.Ed. 905 (1851). They apply to all classes of mail, and prohibit the private carriage of letters over post routes. *Associated Third Class Mail Users v. USPS*, 600 F.2d 824 (D.C. Cir. 1979). "[A] policy concern clearly implicated in the quest for the proper scope of the monopoly [is] the need to shield postal operations from competition so the Postal Service can adopt nonmarket solutions in its effort to further various rational goals . . ." *Id.* at 826. See, e.g., PRA sec. 101 (postal policy). "[P]ublic policy . . . must be well defined and documented, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Local Union 759, URWA*, 103 S. Ct. 2177, 2183 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

## III. The Proposed Rule Changes of October 10, 1985

The Federal Register notice of March 21, 1986, withdrew that of October 10, 1985. The latter had proposed to "clarify" the PES regulations to remove what was truly a nonexistent ambiguity in the current regulations which prohibit the private carriage of letters by so-called "international remailers" because their operations fail to qualify for the "extremely urgent letter" suspension. We agree with the USPS that this suspension was never intended to allow bulk shipment of non-priority mail

without payment of U.S. postage. To the extent that the proposed suspension acknowledges that current regulations apply to remailers, we agree.

We disagree entirely with the Justice Department's opinion that the regulations were too vague to enforce. That Department has no particular expertise in postal matters; it should have accepted the USPS's interpretation of its own statutes and regulations. Because the USPS's reasoning was neither "plainly erroneous [n]or inconsistent with the purpose of the statutes," *National Retired Teachers Ass'n v. USPS*, 430 F. Supp. 141, 145 n. 20 (D.D.C. 1977), a reviewing court would have sustained the USPS's reading of its own statute. See *Rockville Reminder, Inc. v. USPS*, 480 F.2d 4, 7 (2d Cir. 1973).

The fact that this Administration's Department of Justice refused to allow the USPS to sue to enjoin their operations, 39 U.S.C. 409 (d), is no reason to change the regulations. The USPS is an independent establishment of the Executive Branch of the Government. 39 U.S. sec. 201. Such statutory independence ought to insulate the USPS from the intrusions of politics and ideology in the formulation and implementation of policy and the administration of its own statute. Such protection from political and ideological interference ought not be relaxed to permit the Department of Justice to review and, in effect, regulate the USPS's most fundamental policy and litigation decisions. Unlike the USPS, which is by statute independent and non-political, 39 U.S.C. sec. 201, 1002, administrations change, along with their ideological agendas. If need be, others affected by remailers are certain to enforce the PES. See *NALC v. Independent Postal System of America, Inc.*, 470 F.2d 265 (10th Cir. 1972); *APWU v. React Postal Services, Inc.*, 771 F.2d 1375 (10th Cir. 1985).

#### IV. The Record Does Not Demonstrate That the Proposed Suspension is in the Public Interest

The USPS proposed to suspend the PES under 39 U.S.C. sec. 601(b): "The Postal Service may suspend the operation of a part of [sec. 601(a)] upon any mail route where the public interest *requires* the suspension" (emphasis added). It is not sufficient that the suspension is not repugnant to the public interest; the public interest must affirmatively *require* the suspension. The history of the PES, outlined above, demonstrates that, from the founding of the Republic, Congress created the monopoly, and at every turn strengthened it. It legislated a blanket prohibition, and closed every known loophole in it, except where it saw fit expressly to make exceptions. (As the USPS is aware, the "extremely urgent letter" suspension is not among the legislated exceptions.) In the PES, and in the policies of the PRA, Congress has forcefully spoken on where it sees the public interest.

The burden is especially heavy on the USPS to *demonstrate* that the public interest requires a deviation from the general rule. Any countervailing policies must be among those embodied in specific statutory pronouncements. *W.R. Grace, supra*. Mere citation to one set of statutes — the antitrust laws — does not make the case for those who support the suspension. Those laws do not legislate the so-called "free market system" into law. They establish principles regulating and fostering competition *where competition exists*. Nothing in the Constitution demands that Congress allow competition. Self-evidently, the operation of a postal service has always been a function of a government, where competition is not the rule. There is simply no legal *right* to compete with the federal government, or to remove the government from a commercial sphere which it has exclusively occupied since the Articles of Confederation. Cf. *Tennessee Electric Power Co. V. TVA*, 306 U.S. 118 (1937). Turning to

the specifics in the record, there exists no support for a finding that the proposed suspension is in the public interest.

#### A. The Record is Unreliably Weak

The USPS's notice itself acknowledges how weak is the record on which it seeks to base its proposed suspension. The comments submitted are unresponsive to the list of issues on which the USPS solicited responses in its March 21 notice. The record was not compiled at a hearing of any kind. Certainly, the "roundtable" at USPS Headquarters on May 22 does not qualify. The record contains no economic analysis. The "facts" related in them are totally *ex parte* and unreliable. Indeed, the actual operations of remailers are not revealed in any detailed manner. No party has had the opportunity to conduct any discovery of the facts exclusively in the possession of other parties. In particular, the records does not tell us of the following in any reliable way:

- The loss of revenue to the USPS
- The volume of remailed letters
- The extent of demand for remail services, and their value to users
- The impact of a suspension on international postal policy, trade treaty obligations and on international relations in general
- The effect of a suspension on employees of the USPS unless the USPS creates a factual record, one in which confidence reasonably can be placed, it is simply in no position to make a judgment as to whether the public interest demands this suspension.

#### B. The Specifics in the Record Do not Withstand Analysis

1. *Loss of Revenue.* This ought to be the key question to the USPS. The PES, which are revenue protection measures, compel it to be so. Legalization of remail must be seen for what

it is — a *total giveaway* to companies which use remail services. They are, by this rule, *made exempt* from domestic postage. Instead, they pay *foreign* postage on *each piece* and pay only terminal dues pursuant to the Universal Postal Union rules. Under the proposed rule, the USPS give away international postage, and is, of course, not compensated even by terminal dues or transit fees. It is obvious that the revenue at stake is substantial if, as the remailers allege, an entire industry has grown up and is supported by revenues from international remail (even considering the cost of foreign postage).

The USPS is econometrically sophisticated enough to estimate the revenue loss attributable to remail services and to the proposed rule. Not to have done so is an unconscionable abdication of its responsibilities. For this reason alone, and above all others, the proposed rule should be withdrawn.

Even if the USPS were to accept the unsupported and self-serving estimates of revenue loss of between \$25 million and \$500 million (51 FR at 21,931), we fail to see how the USPS can so casually turn up its nose at this sum of money. The difference will be made up by all other users of the mail. Although users of remail services will benefit from the proposed suspension, all other users of the USPS will suffer correspondingly. Their interests are utterly forgotten in this proposal.<sup>1</sup>

<sup>1</sup> A saving grace, not mentioned in the Federal Register notice, is the possibility that the USPS could *compete* with remailers by offering its own services, e.g., International Priority Airmail Service ("IPAS"). Already, business and its allies at DOJ have served notice that they intend to attach the USPS rates as "predatory." See, e.g., Comments of DOJ, dated June 9, 1986; Comments of Int'l Remail Co., dated May 30, 1986. Clearly, these parties do not intend to tolerate this situation. They want the USPS out of this phase of their activities altogether.

The irony here is that the most anti-antitrust administration in memory has stated its intent to scrutinize the USPS's proposal with a fine-toothed comb for the same of private interests in competition with the USPS.

2. *Speed of Service.* There is no believable evidence in the record that remailers deliver better service than international mail. What is known about their operations believes this assertion. Unlike international courier services (e.g., Federal Express, according to its spokesman at the May 22 meeting), remailers ship non-priority letters in bulk as freight, and deposit them in the foreign postal administration. We do not even know whether they are entered at any kind of expedited or priority classification. The USPS, in fact, states that largely these letters are the equivalent of bulk third class material, catalogues, and the like. If speed is truly an issue, the many businesses (and the USPS itself) which provide expedited delivery under the urgent letter suspension supply it.

3. *Cost of Service.* Although there is no reliable data on the cost of remail, the USPS accepts as a given that use of remailers is cheaper than utilization of the USPS. We do not. But even were it true, this fact begs the question under the PES. All competitors of the USPS "skim the cream" in order to undercut the USPS. A service which is universal and features a uniform rate for first class letters is a natural monopoly, as shown in the Board of Governors' 1973 Study. The fact that remailers may skim deserves no weight at all.

4. *International Competition.* We fully agree with the USPS's observation that, on the justification that remailers help United States-based companies to compete in international markets, "the comments provide little more than conclusions," and that its efforts to obtain information on which to base a finding on this issue have failed. That those businesses which use remail services are engaged in international commerce is, of course, true. What they ask for, put it plainly, is a *subsidy* from the USPS. Whether the United States economy is *aided* by their operations, whether they attract or export capital, help or exacerbate the imbalance of United States trade, or provide

employment for American workers, is utterly unknown. Raw ideological pronouncements do not fill the void.

#### V. The Proposal May have Uncontemplated International Effects

The Universal Postal Union ("UPU"), a United Nations affiliate, regulates the relationship between member postal administrations, including the USPS. The Department of Justice, in its December 12, 1985, comments (at 19-20, n.28) discusses the competition among foreign postal services in international bulk mail. It explains that the UPU has responded to this competition by instituting regulations "that can be viewed as an attempt to enforce an international postal cartel." Put another and less ideological way, it may well be that the UPU is attempting to reassert a *right under treaty* to close the remail loophole. What then, of the United States' international commitments? Is the USPS obliged to help prevent this sort of chiseling? Not only do we know know — the USPS informs us that the final treaty itself (the Universal Postal Convention, which was negotiated by the USPS and signed by the President) is not even available at USPS headquarters! Prudence dictates that the USPS stop, think, and investigate before it takes a major step that could violate its international obligations.

#### VI. The USPS Should Await USPS Investigation Before Acting

All are aware of the scandal surrounding the activities of former Board Vice Chairman Voss. We know that private interests have infiltrated USPS decisionmaking for their own benefit, to the detriment of the public. This remail proposal is so unsupported by facts in the record, so clearly contrary to the USPS's financial interests, and such a complete reversal of the institutional thinking of the USPS, that one must ask how it came about, who influenced it, and why. The USPS is to be commended for looking under stones in the Voss affair, unafraid of the consequences. The same searching inquiry is called for here.

It is preferable that it be done by the USPS itself, instead of in court actions challenging the proposed suspension as contrary to the PRA and beyond the USPS's powers.

### CONCLUSION

For these reasons, the proposed rule should be adopted.

Respectfully submitted,

Dated: July 21, 1986

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## POSTAL SERVICE

### 39 CFR Part 320

#### Restrictions on Private Carriage of Letters; Suspension of the Private Express Statutes; International Remailing

AGENCY: Postal Service

ACTION: Final rule.

Summary: This final rule suspends the operation of the Private Express Statutes, 18 U.S.C. 1693-1699, 39 U.S.C. 601-606, with respect to international remailing so as to permit the private, uninterrupted carriage of letter from the United States to a foreign country for ultimate delivery outside of the United States.

EFFECTIVE DATE: September 19, 1986.

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley (202) 268-2971.

SUPPLEMENTARY INFORMATION: On June 17, 1986, the Postal Service proposed to suspend the Private Express Statutes to permit "international remailing." The adoption of this rule completes a public rulemaking process that began with the publication of a Notice of Proposed Rulemaking in October 1985.

"International remailing" consists of the carriage by private firms of shipments of letters, addressed to persons outside the United States, entirely outside of the United States Mails to foreign countries where the letters are deposited into the mails of foreign postal administrations.

The proposal establishes in the Federal Register of October 10, 1985, 50 FR 41462, would have amended the regulation establishing the administrative suspension of the Statutes for extremely urgent letters, 39 CFR 320.6, so as to make clear that

this suspension, which had not been intended to authorize remailing, did not in fact do so. Most of the comments submitted in response to the notice opposed the proposal, and instead supported the practice of remailing. Subsequently, on March 4, 1966, the Chairman of the Board of Governors of the Postal Service would commence a new rulemaking proceeding to establish the lawfulness of remailing.

On March 21, 1966, the Postal Service published a Federal Register notice which withdrew the October 10, 1985 proposed rule, and solicited information on the nature and extent of remailing and on the benefits derived by the public from this practice. 51FR 9852. In addition, the Postal Service, following the close of the period established for response to the March 21 solicitation, held a public meeting on May 22, 1986. (Notice of this meeting was published on May 12, 1986, 51 FR 17366). The information garnered in the successive steps described above forms the factual record upon which the Postal Service based the proposal, in the Federal Register on June 17, 1986, to permit remailing.

Nine additional comments were submitted in response to the June 17 notice. Eight of the comments expressed support for the proposal. Five expressed general support for the suspension and did not suggest any specific changes; three suggested that the suspension be modified in various ways. After careful consideration of all the comments, including those submitted in previous related proceedings, the Postal Service, also bringing to the process its knowledge of and experience with the international mails, has concluded that the proposed suspension should be adopted without substantial modification. The statement of the purpose of this rule and the basis for it, which was published in the June 17 notice, and also the March 27 notice, are incorporated herein and form integral parts of this notice.

### **Applicability of Private Express Statutes to International Remailing.**

Two of the comments submitted in response to the June 17 notice, although generally supporting the proposal, raised the threshold questions of whether the Private Express Statutes have any applicability to the international carriage of letters and whether the Postal Service has the authority to adopt a suspension to regulate the international private carriage of letters. These questions had been raised in the earlier comments and were carefully considered at that time. The Postal Service reiterates its statement on these questions which was published in the June 17 notice.

On the matter of the authority to regulate international remailing, one comment contended that this power should be vested in the Executive Branch, in particular the Department of Justice, and not the Postal Service. The comment also suggests that rather than adopting a regulation, the proposed suspension should be recast as a statement of general policy. In adopting the suspension, however, the Postal Service is acting pursuant to authority specifically and exclusively delegated to it by Congress in the Private Express Statutes themselves. 39 U.S.C. 601(b). The Postal Service is also empowered under 39 U.S.C. 401(2) to adopt, amend, and repeal regulations in order to further the objectives of title 39. *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824, 826 n.5 (D.C. Cir. 1979). This title, of course, includes the statute noted above which authorizes the suspensions. Finally, the Postal Service is itself an independent establishment in the Executive Branch, 39 U.S.C. 201, and as such it is generally not responsible to other Executive Branch agencies in promulgating postal regulations. Nonetheless, the Postal Service has solicited the views of various agencies and has received and considered comments on these proposals from several agencies.

### **Nonapplicability of Suspension for Extremely Urgent Letters to Remailing**

Several comments noted that in adopting a new suspension for remailing the Postal Service is implicitly concluding that the suspension for extremely urgent letters, 39 CFR 320.6, ought not be interpreted as itself permitting remailing. While two comments agreed with this rationale, a third requested that this interpretation be expressly repudiated. The Postal Service, by adopting this suspension for international remailing, has expressly and forthrightly determined that the practice will be permitted, and has stated the conditions under which it will be permitted. The Postal Service has also concluded that remailing need not be sanctioned under the color of a suspension which was intended for another purpose.

### **Prohibition on Ultimate Delivery Within the United States**

One comment objected to the provision which requires that letters carried pursuant to the suspension not be ultimately delivered within the United States. The comment contends that this provision should not be adopted because remailing back into the United States is negligible, and because this limitation is said to prevent Americans from availing themselves of lower postage rates that are offered to non-Americans. These objections are not persuasive, as explained in the June 17 notice.

The new suspension is not intended to allow the practice of mailing in a foreign country matter which is subsequently shipped by the postal administration of that country through the United States, as open or closed transmit mail, under circumstances which cause the United States to incur expenses for which it is not reimbursed. This caveat does not prohibit the private carriage of letters from remailing if that carriage is within the terms of the new suspension, but neither does the suspension limit the remedies available to the Postal Service with respect to transit mail.

### **Inspections and Audits**

With regard to subsection (c) of the suspension, one comment suggested that this provision should be modified to include inspection and audit guidelines, and also to include a requirement that the Postal Inspection Service provide the shipper with advance notice of an inspection or audit, absent reasonable cause to suspect activity not in conformity with the regulation. Another comment advanced the view that subsection (c) should not be adopted because it exceeds the authority of the Postal Service. The Postal Service has concluded that the suggested inclusion of special inspection and audit guidelines in this regulation is unnecessary because these are well established functions of the Inspection Service. The authority of the Postal Service to investigate postal offenses and civil matters relating to the Postal Service is specifically provided by statute, 39 U.S.C. 404(a)(7). We note, moreover, that a similar provision has been included previously in a suspension of the Statutes. See 39 CFR 320.6(e), and compare 39 CFR 320.3(d). The Postal Service has, however, determined that working in subsection (c) should be modified to read:

The failure of a shipper or carrier to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service. ...

This minor modification makes it clear that it is the Postal Inspection Service which authorizes and conducts the inspections and audits.

### **The Factual Record as Supporting the Suspension**

The comment opposed to adoption of the suspension asserted that the record is inadequate to support the adoption of the regulation, and that it is not manifest from the record that the public interest requires the establishment of the suspension. The Postal Service had sought, in its notice of march 21, 1986, and

subsequently to obtain precise and detailed information regarding the level of services provided by remailers, and the benefits which the customers of the latter derive. It may well be, however, that because of the diverse character of the remail industry and the relatively recent development of remailing, the comprehensive information we had hoped to receive to supplement the essentially anecdotal information, which was furnished to us, is not available. Nonetheless, the Postal Service has compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension.

The factual record includes the comments received in response to the October 10 and June 17 notices. Information was also obtained in response to the Federal Register notice of March 21 which reprinted and addressed generally a letter, dated March 14, 1966, sent to commenters who responded to the October 10 notice, soliciting further information for the record. The transcript of the public meeting held May 22, 1986 is also part of the record.

The comments came primarily from American commercial enterprises, including financial institutions and publishers, that use the services of international remailers in conducting their business abroad. The comments were almost universally consistent in their observations regarding the level of service provided by remailers. Specifically, the comments asserted that remailing was faster than U.S. airmail and that this time savings is often critical to the ability of American businesses to compete in foreign markets. Moreover, the comments asserted that remailing services were provided for a lesser cost than U.S. airmail, thereby also enhancing the ability of American firms to compete abroad. Although the Postal Service did not receive across-the-board data on the level of service provided by remailers, many commenters did provide information, testimonial in nature, indicating that their use of remail services has resulted in time and cost savings. Numerous commenters

noted that this time and cost differential was critical in order for letter matter being sent abroad to retain its commercial value. Several commenters also stated that, without faster and cheaper services provided remailers, it would not be feasible for their businesses to compete in the international markets. The Postal Service found it significant that the comments received in response to the October 10 notice, which proposed language to make clear that remailing is not authorized under the suspension for extremely urgent letters, were overwhelming in their support of remailing. The Department of Commerce informed us that international remailing is of benefit to American businesses in foreign markets, a position also reflected in comments from the Department of Justice and the Office of Management and Budget.

#### Content of the Suspension

The suspension, which is codified as § 320.8 of title 30, Code of Federal Regulations, suspends, in § 320.6 operation of the Statutes:

to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery within the United States:

This suspension shall not permit the shipment of carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

A third provision, in § 320.8(c), generally authorizes the Postal Service, after notice and hearing, to revoke the suspension for a period of one year, as to a particular shipper or carrier operating in violation of the suspension. This provision also provides that a shipper or carrier's failure to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service would, for the purpose of proceedings under this subsection create a presumption of a violation. This has the effect of shifting the burden of demonstrating compliance to the

shipper or carrier, who would have access to relevant information which its failure to cooperate has denied to the Postal Service.

In view of the considerations discussed above, 39 CFR Part 320 is \*\*\*as follows:

#### List of Subjects in 39 CFR Part 320

Postal Service, Computer technology, Advertising.

#### PART 320-SUSPENSION OF THE PRIVATE EXPRESS STATUTES

1. The authority citation for Part 320 is revised to read as set forth below, and the authority citations following all the sections in Part 320 are removed.

Authority: 39 U.S.C. 401, 404, 601-606; 18 U.S.C. 1693-1699.

2. A new § 320.8 is added to read as follows:

#### § 320.8 Suspension for international remailing.

(a) The operation of 39 U.S.C. 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

*Example (1)* The letters to overseas customers of commercial firm A in Chicago are carried by Carrier B to New York where they are delivered to Carrier C for carriage to Europe. Carrier C holds the letters in its distribution center overnight, then sorts them by country of destination and merges them with letters of other firms to those countries before starting the carriage to Europe in the morning. The carriage of firm A's

letter is not interrupted. The suspension for international remailing applies to the carriage by Carrier B and by Carrier C.

*Example (2)* The bills addressed to foreign customers of the Chicago branch office of commercial firm D are carried by Carrier E to New York where they are delivered to the accounting department of firm D's home office. The accounting department uses the information in the bills to prepare its reports of accounts receivable. The bills are then returned to Carrier E which carries them directly to Europe where they are entered into the mails of a foreign country. The carriage of the bills from Chicago to Europe is interrupted in New York by the delivery to firm D's home office. The suspension for international remailing does not apply to the carriage from Chicago to New York. It does apply to the subsequent carriage from New York to Europe.

(b) This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

*Example (1)* A number of promotional letters originated by firm F in Los Angeles are carried by Carrier G to Europe for deposit in the mails of a foreign country. Some of the letters are addressed to persons in Europe, some to persons in the United States. The suspension for international remailing does not apply to the letters addressed to persons in the United States.

(c) Violation by a shipper or carrier of the terms of this suspension is grounds for administrative revocation of the suspension as to such shipper or carrier for a period of one year in a proceeding instituted by the General Counsel in accordance with Part 959 of this chapter. The failure of a shipper or carrier to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service for the purpose of determining compliance with the terms of this suspension shall be deemed to create a presumption of a violation for the purpose of this paragraph (c) and shall shift to the shipper or carrier the

burden of establishing the fact of compliance. Revocation of this suspension as to a shipper or carrier shall in no way limit other actions as to such shipper or carrier to enforce the private Express Statutes by administrative proceedings for \*\*\* of postage (see § 310.5) or by civil or criminal proceedings.

Fred Eggleston,  
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Billing Code 7710-12-M

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**AMERICAN POSTAL WORKERS UNION, AFL-CIO**  
1300 L Street, N.W.  
Washington, D.C. 20005

**NATIONAL ASSOCIATION OF LETTER  
CARRIERS, AFL-CIO**  
100 Indiana Avenue, N.W.  
Washington, D.C. 20001  
*Plaintiffs*

v.

**UNITED STATES POSTAL SERVICE**  
475 L'Enfant Plaza  
Washington, D.C. 200260  
*Defendant.*  
Civil Action No. 87-3199

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. This is an action for declaratory and injunctive relief or, in the alternative, for a writ of mandamus, to challenge the authority of the United States Postal Service ("USPS") to issue regulations suspending the operation of the Private Express Statutes ("P.E.S."), 39 U.S.C. §§601-606, and 18 U.S.C. §§1693-1699, 1724, for the international remailing where it has not been demonstrated that the public interest requires the suspension within the meaning of 39 U.S.C. §601(b). Plaintiffs assert claims under the P.E.S.; 39 C.F.R. part 320; the Declaratory Judgments Act, 28 U.S.C. §2201; and the federal mandamus statute, 28 U.S.C. §1361.

## JURISDICTION

2. This Court has jurisdiction over this action pursuant to 39 U.S.C. §409 and 28 U.S.C. §§1331, 1361 and 2201.

3. Venue lies within this district pursuant to 28 U.S.C. §1391(e).

## PARTIES

4. Plaintiff American Postal Workers Union, AFL-CIO ("APWU") is a national labor organization which represents for purposes of collective bargaining approximately 250,000 employees of the USPS in the clerk, maintenance, special delivery messenger, and motor vehicle service crafts nationwide.

5. Plaintiff National Association of Letter Carriers, AFL-CIO ("NALC") is a national labor organization which represents for purposes of collective bargaining approximately 220,000 employees of the United States Postal Service ("USPS") in the city letter carrier craft nationwide.

6. Defendant United States Postal Service ("USPS" or Postal Service") is an independent establishment of the executive branch of the United States government, established pursuant to 39 U.S.C §201.

## STATUTORY AND REGULATORY FRAMEWORK

7. The PES generally prohibit the private carriage of letters over post routes. 39 U.S.C §§ 601-606. Pursuant to Postal Service regulation, a letter is defined as a message directed to a specific person or address and recorded in or on a tangible object. 39 C.F.R. §310.1(a).

8. A person who carries mail or who establishes a private express for the conveyance of letters or packets may be fined or imprisoned. 18 U.S.C. §§1693-1699, 1724.

9. The purpose of the PES is to preserve the USPS's revenue base by prohibiting private competition with the Postal Service, thereby insuring the maintenance and development of high standards of postal delivery through the United States. The statutes prevent the skimming of revenues by businesses which are not bound by the USPS's universal service and uniform rate requirements who compete in the cheaper, easier classes of mail.

10. The Postal Service is authorized to suspend the operation of the PES upon any mail route where the public interest requires the suspension. 39 U.S.C. §601(b).

11. While the USPS is generally exempt from the provisions of the Administrative Procedures Act ("APA"), 5. U.S.C. Chapters 5 and 7, 39 U.S.C. §410, it voluntarily follows APA procedures. 39 C.F.R. §310.7.

## THE FACTS

12. On October 10, 1985, an amendment to the regulations suspending the P.E.S. for extremely urgent letters was proposed by the Postal Service and published in the Federal Register in order to clarify that the suspension for extremely urgent letters was not intended to authorize international remailing.

13. On March 4, 1986, the Chairman of the Board of Governors of the Postal Service announced the commencement of new rulemaking proceeding to suspend the PES for international remailing and the proposed rule published on October 10, 1985, was withdrawn in a March 21, 1986 Federal Register notice. The March 21, 1985 notice solicited information on remailing and the benefits derived by the public from the practice.

14. The USPS received comments in response to the proposed regulation and held a public meeting on May 22, 1986. APWU and NALC submitted comments in opposition to the suspension and attended the May 22, 1986 meeting, in which

they pointed out that no comprehensive information had been received demonstrating that the public interest requires the suspension of the PES for international remailers.

15. In spite of the lack of factual support, on August 20, 1986, the Postal Service published a notice of final rule suspending the operation of 39 U.S.C. §601(a)(1)-(6) and 39 C.F.R. part 310.2 (b)(1)-(6) on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery outside of the United States. 39 C.F.R. §320.8.

16. As a result of this suspension, the Postal Service has lost substantial revenue to the overall detriment of the nationwide postal system. APWU and NALC members also have been directly affected in their employment opportunities by this suspension.

17. On June 1, 1987, the APWU and NALC petitioned the Postal Service to rescind the regulations. On July 28, 1987, the Postal Service denied the petition.

### CLAIMS FOR RELIEF

18. The defendant Postal Service has violated the P.E.S. through the actions described in paragraphs (12) through (16). Specifically, the defendant has promulgated a regulation suspending the P.E.S. for international remailing without adequate evidence demonstrating that the public interest requires the suspension as required by 39 U.S.C. §601(b).

19. The defendants actions, as described above, were: a) arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations; and unwarranted by the facts within the meaning of 5 U.S.C. §706; b) beyond the ruling making powers conferred by 39 U.S.C. §401(2); and/or c) not in accordance with 39 U.S.C. §601.

WHEREFORE, plaintiffs respectfully request that this court provide the following relief:

(a) a declaratory judgment declaring that defendant's action promulgating 39 C.F.R. §320.8 violated the P.E.S.;

(b) a preliminary and permanent injunction or, in the alternative, a writ of mandamus (1) requiring defendant to revoke 39 C.F.R. §320.8 and (2) prohibiting defendant from giving effect to 39 C.F.R. §320.8.

(c) an order awarding plaintiff his costs, disbursements, and reasonable attorney's fees; and

(d) such other and further relief as the Court may deem appropriate.

Dated: November 16, 1987

Respectfully submitted,

Anton G. Hajjar  
O'DONNELL, SCHWARTZ  
& ANDERSON  
1300 L Street, N.W., Suite 200  
Washington, D.C. 20005-4178  
(202) 898-1707  
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, and NATIONAL ASSOCIATION OF  
LETTER CARRIERS, AFL-CIO,  
*Plaintiffs,*

v.

UNITED STATES POSTAL SERVICE,  
*Defendant.*  
Civil Action No. 87-3199 CRR

ANSWER

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiffs lack standing to bring this action.

THIRD DEFENSE

In response to the numbered paragraphs of the complaint, defendant admits, denies, or otherwise avers as follows:

INTRODUCTION

1. This paragraph contains plaintiff's characterization of this action to which no response is required. To the extent that a response may be deemed to be required, defendant denies these allegations.

JURISDICTION

2. This paragraph contains plaintiffs' jurisdictional allegations to which no response is required. To the extent that a response may be deemed to be required, defendant denies these allegations.

3. This paragraph contains conclusions of law to which no response is required. To the extent that a response may be deemed to be required, defendant denies these allegations.

PARTIES

4-6. Admits.

STATUTORY AND REGULATORY FRAMEWORK

7-8. Defendant neither admits nor denies the allegations in these paragraphs, but respectfully refers the Court to the cited statutory and regulatory provisions for a full, complete and accurate statement of their contents.

9. Defendant denies the allegations in this paragraph, and respectfully refers to the Court to the relevant statutes and their legislative history for a full, complete and accurate statement of their contents.

10. Admits.

11. Defendant admits that it is generally exempt from the application of the Administrative Procedure Act ("APA") to the exercise of its powers, but that it has committed itself, by regulation, to follow the rulemaking provisions of the APA in connection with the promulgation of regulations concerning the Private Express Statutes. Defendant otherwise denies the allegations in this paragraph.

THE FACTS

12. Admits.

13. As to the first sentence, defendant admits that on March 4, 1986, the Chairman of the Board of Governors of the Postal Service announced that a new rulemaking proceeding would be initiated concerning the suspension of the Private Express Statutes for international remailing, but respectfully refers the Court to the cited announcement for a full and complete statement of its contents. Defendant further admits that the proposed rule published on October 10, 1985, was

withdrawn in a March 21, 1986 Federal Register notice. As to the second sentence, defendant admits that the March 21, 1986 notice solicited information on remailing, but respectfully refers the Court to the cited notice for a full, complete, and accurate statement of its contents.

14. Defendant admits the allegations in the first sentence of this paragraph. Defendant admits that plaintiffs submitted comments in opposition to the proposed regulation, and attended the public meeting on May 22, 1986, as alleged in the second sentence of this paragraph. Defendant neither admits nor denies plaintiffs' characterization of the substance of their comments, but respectfully refers the Court to the cited comments for a full, complete and accurate statement of their contents.

15. Defendant admits that, on August 20, 1986, it published a notice of final rule suspending the operation of the Private Express Statutes for international remailing, but respectfully refers the Court to the cited Federal Register notice for a full, complete, and accurate statement of its contents. Defendant otherwise denies the allegations in this paragraph.

16. Defendant denies the allegations in the first sentence of this paragraph. Defendant denies the allegations in the first sentence of this paragraph. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of this paragraph, and therefore denies the same.

17. Admits.

#### CLAIMS FOR RELIEF

18-19. These paragraphs contain conclusions of law to which no response is required. To the extent that a response may be deemed to be required, defendant denies these allegations.

The plaintiffs are not entitled to the relief sought in the complaint or to any relief whatsoever.

Except to the extent expressly admitted or qualified above, defendant denies each and every allegation in the complaint.

Having fully answered, defendant respectfully requests that the Courts dismiss this case with prejudice, award defendant its costs, and grant such other relief as may be appropriate.

Respectfully submitted,

Joseph E. DiGenova,

D.C. Bar #073320

United States Attorney

John D. Bates, D.C. Bar #934927

Assistant United States Attorney

Wilma A. Lewis, D.C. Bar #358637

Assistant United States Attorney

#### OF COUNSEL:

Charles D. Hawley

Catherine V. Pagano

Law Department

United States Postal Service

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Washington, D.C. 20260

(202) 268-2970

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, *et al.*,  
*Plaintiffs,*

v.

UNITED STATES POSTAL SERVICE,  
*Defendant.*  
Civil Action No. 87-3199 CRR

**DEFENDANT'S MOTION TO DISMISS OR IN  
THE ALTERNATIVE FOR SUMMARY JUDGMENT**

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, defendant United States Postal Service moves this Court for an Order dismissing this action on the ground that the plaintiffs lack standing to bring this action, and this Court therefore lacks jurisdiction to entertain plaintiffs' claims. Alternatively, defendant moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an Order entering summary judgment in its favor on the ground that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

In support of this motion, defendant refers the Court to the attached statement of material facts as to which there is no genuine issue, memorandum of points and authorities, declaration of Charles D. Hawley and the administrative record filed contemporaneously herewith.

Respectfully submitted,

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JAY B. STEPHENS,  
D.C. Bar #177840  
United States Attorney

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JOHN D. BATES, D.C. Bar #934927  
Assistant United States Attorney

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WILMA A. LEWIS,  
D.C. Bar #358637  
Assistant United States Attorney

OF COUNSEL:

CHARLES D. HAWLEY  
CATHERINE V. PAGANO  
General Administrative  
Law Division  
Law Department  
United States Postal Service

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, *et al.*,  
*Plaintiffs,*

v.

UNITED STATES POSTAL SERVICE  
*Defendant.*  
Civil Action No. 87-3199 CRR

DECLARATION OF CHARLES D. HAWLEY

I, Charles D. Hawley, declare as follows:

1. I am the Assistant General Counsel of the General Administrative Law Division, United States Postal Service. I have been employed with the Postal Service for nineteen years.

2. The Administrative Law Division was responsible for conducting the rulemaking involving the suspension of the Private Express Statutes for international remailing, including the publishing of notices in the Federal Register, the compilation and review of the Administrative record and the promulgation of the final rule. As the official in charge of the Administrative Law Division, I was primarily responsible for conducting the rulemaking.

3. In about 1982, the Postal Service became aware that a few firms were offering a service that came to be known as international remailing. This service, of interest to mailers of large numbers of letters to addressees overseas, involves the collection of mailable matter from a sender and their carriage, outside of the mail stream, to some point outside the United States. There, the letters are entered into the mails of the foreign country, at rates charged by that country's postal administration, for delivery in normal course to the individual addressees. The

country in which the letters are mailed may be the country in which the letters are to be delivered, but it need not be and typically not.

4. The Postal Service believed that the practice of international remailing violated the Private Express Statutes, the laws which make it unlawful, with certain exceptions, to carry letters or packets over postal routes unless postage is paid to the Postal Service. We believed that the remailers' activities were unlawful because once they received letters from the senders, they carried the letters over postal routes for varying distances before getting them out of the United States.

5. The regulation that was generally relied upon to support the practice of remailing was the suspension of the Private Express Statutes for extremely urgent letters, 39 C.F.R. § 320.6. This suspension had been adopted to sender and recipient, required delivery in a shorter period of time than the Postal Service could provide. It provided two alternative sets of conditions which, if either were met, would allow private carriage without payment of postage to the Postal Service. One condition was a "cost" test, on the theory that if the shipper were willing to pay a carrier a sufficient premium for the carriage of a letter it was likely that the letter was, in fact, extremely urgent. To meet this test the shipper had to pay the carrier for each letter the greater of \$3.00 or twice the domestic First Class Mail rate for a letter of the same weight. The rule also provided that a shipment consisting of "a number of letters ... picked up together at a single origin and delivered together at a single destination" should be treated as a single letter for the purpose of applying the cost test. 39 C.F.R. § 320.6(c). This provision had been intended to simplify the computation and reduce the cost of multiple letters written in one location and utilized at a second, e.g., two offices of a corporation in different cities. Its significance, however, if applied to all of a shipper's letters carried at one time by a remailer, was that the cost test was rendered

meaningless because the premium cost to the shipper would be spread over so great a number of letters that it would lose its effect.

6. In October of 1985, we initiated a rulemaking proceeding to amend the applicable regulation to state unequivocally that a shipment of letters intended for ultimate delivery to diverse addressees could not be treated as a single letter under the cost test, and thus the practice of international remailing did not fall within the scope of the suspension for extremely urgent letters. 50 Fed. Reg. 41462 (October 10, 1985).

7. The notice of proposed rulemaking elicited over eighty comments, virtually all of them opposed. Most of the comments indicated that the service they received from remailers was less expensive than the Air Mail rates charged by the Postal Service; that the remailers' delivery times were generally faster; and that international remailing allowed them to remain competitive abroad. We also received a number of comments from officials in the executive and legislative branches of the federal government who cited the benefits said to be achieved from competition in international mail and increased competitiveness of United States firms abroad.

8. In March, 1986, John McKean, the then Chairman of the Postal Service Board of Governors, issued a statement that the Postal Service would be acting to "remove the cloud" over the lawfulness of remailing and would be undertaking a new rulemaking proceeding to establish a record upon which to base our action.

9. Following Mr. McKean's announcement, the Postal Service wrote, on March 14, 1986, to each person who had submitted comments on the October 1985 proposal, informing them of the change of direction, withdrawing the original proposal and soliciting information for the prospective rulemaking. We requested factual information on a number of matters bearing on the issue of speed and reliability of service for letters

sent through remailers. A public notice in the Federal Register on March 21, 1986, which contained the text of the March 14, 1986 letter, invited similar responses from the general public.

10. A number of comments were received after the March 21, 1986 Federal Register notice. Those comments were generally consistent in tone and substance with the comments to the October, 1985 notice. On May 12, 1986, we published a notice in the Federal Register to announce that a public meeting would be held concerning international remailing. At this informal public meeting, held on May 22, 1986, there was opportunity for general discussion and for oral comments both on the issues and on the form that a suspension of the Private Express Statutes for remailing might take.

11. On June 17, 1986 we published a proposed rule in the Federal Register to suspend the operation of the Private Express Statutes for international remailing. Prior to publication of the June notice, we reviewed all the comments carefully. While they lacked in certain respects the detailed factual information we had hoped to gather at the onset of the rulemaking, it was clear that the overwhelming majority of those who commented favored the suspension, consistently citing cost, speed, service and competitiveness in international markets as reasons in support of their position. The Postal Service has no systematically-compiled information as to the delivery performance of foreign postal administrations with either remailed letters or those mailed through the U.S. Postal Service. However, we believed that the claims made by those in favor of the proposed rule were entitled to weight in view of the consistency of the comments, the reasonableness of the conclusion that remailing generally assists American firms in the international markets, and our known knowledge that remailers as a group charge lower rates than the prevailing rates for the Postal Service's international air mail service.

12. We also considered the revenue effect of the proposed rule. The in-house data systems of the Postal Service are not designed to measure how much of the surface and air mail volume loss of recent years is due to the remail industry. The relative newness of the remail industry, combined with competition from other forms of international communication, such as electronic communication, has made such data collection infeasible. Accordingly, we assessed the revenue effect using the most pessimistic forecast of revenue impact. Specifically, we assumed that the amount of revenue diverted by international remailing would be equal to the total amount of revenue received from international mail during the most recent period (\$882.3 million or 3.2% of total postal revenues). This amount was necessarily overinclusive because it included mail that was not protected from competition under the Private Express Statutes and assumed that the Postal Service would lose all its international mail volume to remailers. Using this pessimistic forecast of revenue impact, we concluded that the revenue loss did not outweigh the perceived public benefit from allowing international remailing.

13. After the publication of the June notice, we received a few other comments, virtually all in favor of the suspension. Prior to Adopting the rule, we again carefully considered the entire record, including the concern expressed by the plaintiffs in this case regarding the inadequacy of the record to support the suspension. We considered the fact that we had not received the comprehensive information that we had originally sought. However, we recognized that such detailed information might be unavailable due to the relative newness of the remail industry and the diverse character of the industry. In any event, as we explained in the discussion that accompanied the publication of the final rule in the Federal Register, we believed that the comments submitted supported the conclusion that the public interest required the suspension. See 51 Fed. Reg. at 29637.

Accordingly, the final rule suspending the Private Express Statutes for international remailing was adopted.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 25th day of March, 1988.

Charles D. Hawley

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, *et al.*,  
*Plaintiffs,*

v.

UNITED STATES POSTAL SERVICE,  
*Defendant*  
Civil Action No. 87-3199 CRR

**DECLARATION OF CHARLES D. HAWLEY**

I. Charles D. Hawley, declare as follows:

1. I am the Assistant General Counsel of the General Administrative Law Division, United States Postal Service. I have been employed with the Postal Service for nineteen years.

2. The Administrative Law Division was responsible for conducting the rulemaking involving the suspension of the Private Express Statutes for international remailing, including the compilation and review of the administrative record. As the official in charge of the Administrative Law Division, I was primarily responsible for the foregoing tasks.

3. I certify that the attached documents constitute the entire administrative record compiled in the promulgation of the rule suspending the Private Express Statutes for international remailing. 51 Fed. Reg. 29636 (August 20, 1986).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executive this 25th day of March, 1988.

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Charles D. Hawley

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS  
UNION, AFL-CIO, *et al.*,

*Plaintiffs,*

v.

UNITED STATES POSTAL SERVICE,  
*Defendant.*

Civil Action No. 87-3199 (CRR)

**INDEX TO ADMINISTRATIVE RECORD**

1. *October 10, 1985 Federal Register Notice: Proposed Rule, "Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters."*

Comments received after the October 10, 1985 notice:

2. *October 21, 1985 letter from R.L. Bulger, Vice President, Harry and David Orchards.*
3. *October 28, 1985 letter from Larry P. Rodberg, President, Air Courier Conference of America.*
4. *November 4, 1985 letter from David B. Popkin, private citizen, Englewood, New Jersey.*
5. *November 12, 1985 letter from Richard P. Stephenson, Chief, Mail and Correspondence, General Services Administration.*
6. *Letter from John Elting Treat, Executive Publisher, Petroleum Intelligence Weekly.*

7. *November 8, 1985* letter from J. Craig Johnson, President Johnson & Hayward.
8. *November 7, 1985* letter from David Shapiro, Traffic Manager, Boarts International, Inc.
9. *November 8, 1985* letter from David Lesser, Vice President and Associate General Counsel of Riggs National Bank.
10. *October 23, 1985* letter from Congressman Mickey Leland and Frank Horton requesting information and extension of time and *November 20, 1985* response.
11. *October 29, 1985* letter from Senator Ted Stevens to Postmaster General Carlin and *November 14, 1985* response.
12. *November 21, 1985* letter from Timothy M. Spicer, Senior Vice President and Chief Financial Officer, Hambrecht & Quist, Inc.
13. *November 25, 1985* letter from David M. Block, of The Book Block.
14. *November 26, 1985* letter from Mehrnoz Rubin, Director of Operations, Business Communications Co., Inc.
15. *November 26, 1985* letter from George E. Lockwood, Jr., President, Lockwood Trade Journal Co., Inc.
16. *December 3, 1985* letter from James M. Jenks, President of the Alexander Hamilton Institute Incorporated.
17. *December 10, 1985* letter with enclosed comments from Robert S. Taylor, Attorney for Newsweek, Inc.
18. *December 5, 1985* letter from Karen Moore, International Direct Marketing Representative from Mosby International.
19. *November 27, 1985* letter from Andrea Millen Rich of Laissez Faire Books.
20. *December 9, 1985* letter from Frederick W. Smith, Chairman, President and Chief Executive Officer, Federal Express.

21. *December 4, 1985* letter from Roy Harry, President, Airsystems Courier.
22. *December 5, 1985* letter from Jerry J. Floom, President, Jet Courier International, and letter from Congressman Philip Crane.
23. *December 11, 1985* letter from Timothy J. May, Counsel for the New York Document Exchange (NYDEX).
24. *December 9, 1985* letter from William Hearn, President, International Executive Reports.
25. *December 9, 1985* letter from John J. Gill, General Counsel, American Bankers Association.
26. *December 11, 1985* letter from Irwin L. Gubman, Senior Vice President and Associate General Counsel, Bank America Corporation.
27. *December 12, 1985* letter from Peter A. Greene, forwarding comments of Armando Labrada, Vice President & Assistant General Counsel, Purolator Courier Corp.
28. *December 12, 1985* letter from Martin L. Stern, Attorney, Antitrust Division, forwarding the comments of the Justice Department.
29. *December 12, 1985* letter from John M. Burzio, Counsel for The New Postal Policy Council.
30. *December 12, 1985* letter from Kenneth B. Allen, Vice President, Government Relations, Information Industry Association.
31. *December 12, 1985* letter from Richard Littell, Counsel for DHL Airways, Inc., Emery Worldwide, Airborne Freight Corporation, and United Parcel Service.
32. *December 12, 1985* letter from James I. Campbell, Jr., Counsel for the Committee on International Remail, enclosing the Committee's comments.

33. *December 12, 1985* letter from James I. Campbell, Jr., enclosing other comments (found here at numbers 34 through 56).
34. *November 20, 1985* letter from Dave Smith, Manager, Corporate Mail Services, Amdahl Corporation. (Enclosure from 33)
35. *November 27, 1985* letter from Glenda Peters, Supervisor, Mailing Services, ARMCO, Inc. (Enclosure from 33)
36. *November 15, 1985* letter from Barbara B. Pearson, Administrative Assistant, International Department, Bentley International. (Enclosure from 33)
37. *November 7, 1985* letter from David Shapiro, Traffic Manager, Boarts International, Inc. (Enclosure from 33, same as Number 8 of this listing)
38. *November 19, 1985* letter from Debbie Rowland, Manager of International Marketing Support from Cardkey Systems. (Enclosure from 33)
39. Letter from Will Tarbox of Esprit. (Enclosure from 33)
40. *November 21, 1985* letter from Timothy M. Spicer, Hambrecht & Quist, Inc. (Enclosure from 33; same letter as number 12 of this listing.)
41. *November 18, 1985* letter from Edward Romero of the Corporate Mail Distribution Center at Hewlett Packard. (Enclosure from 33)
42. *November 19, 1985* letter from Kevin J. Murphy, President, K.J. Murphy & Co. (Enclosure from 33)
43. *November 19, 1985* letter from L.J. Peretzman, Traffic Manager of Maurice Pincoffs Company. (Enclosure from 33)
44. *November 21, 1985* letter from William E. Isabelle, Jr., Manager, Universal Studios Mailroom. (Enclosure from 33)

45. *November 25, 1985* letter from Elizabeth Haran, Office Manager of Medcom, Inc. (Enclosure from 33)
46. Letter from April Keene, Account Representative in International Sales from MicroPro International Corporation. (Enclosure from 33).
47. *November 20, 1985* letter from John J. Wagner, Supervisor, Export Customer Service, with Multigraphics. (Enclosure from 33)
48. *December 3, 1985* letter from L.R. Gess, Manager, Export Sales & Service, Nalco Chemical Company. (Enclosure from 33).
49. *November 18, 1985* letter from Joan I. Black of Pannell, Kerr and Forster. (Enclosure from 33)
50. Letter from John Elting Treat, Executive Publisher of Petroleum Intelligence Weekly. (Enclosure from 33, same letter as number 6 of this listing.)
51. Letter from Maurice Price, Circulation Manager of Petroleum Management. (Enclosure from 33)
52. Letter from Bruce C. Lyle of the Port of Houston Authority. (Enclosure from 33)
53. *November 8, 1985* letter from David Lesser of Riggs National Bank. (Enclosure from 33, same letter as number 9 of this listing.)
54. *November 26, 1985* letter from B.F. Carker, Jr., Vice President, Stone Forwarding Company, Inc. (Enclosure from 33)
55. *November 19, 1985* letter from Juanita Schiavoni, Marketing Supervisor of Validyne International, Inc. (Enclosure from 33)
56. Letter from Clarke Grappe, Mail Operations Supervisor, MBank Houston. (Enclosure from 33)

57. *December 23, 1985* letter from James I. Campbell, Jr. Counsel for International Remail Committee, enclosing additional comments (found here at numbers 58 through 61 below).
58. *December 2, 1985* letter from Theresa McCorkhill, Data/Courier Coordinator for Goulds Pumps, Inc. (Enclosure from 57)
59. *December 2, 1985* letter from D.J. Skudlarek, Supervisor, Mail Processing Center, Nalco Chemical Co. (Enclosure from 57)
60. *December 2, 1985* letter from Al Burchett, Shipping/Receiving Manager, Coast Mailing Corporation (Enclosure from 57)
61. *December 2, 1985* letter from Susan T. Lentz, Manager, Marketing Administration, Global. (Enclosure from 57)
62. *December 30, 1985* letter from James I. Campbell, Jr., Counsel for International Remail Committee, enclosing a letter from Victoria Roehling, Promotion Manager for Johnston International Publishing Corp.
63. *November 1, 1985* letter from Andrew J. D'Angelo, President of Distrimail (Originally sent to Senator Alfonse D'Amato).
64. *December 12, 1985* letter from Michael P. Esposito, Jr., Executive Vice President and Controller, Chase Manhattan Bank.
65. *December 12, 1985* letter from Leonard Wieckowski, Publisher, McGraw - Hill, Inc.
66. *December 11, 1985* letter from John H. Ness, Executive Secretary, World Methodist Historical Society.
67. *December 12, 1985* letter from Edward C. Bursk, President, Advanced Management Publishers, Inc.
68. *December 17, 1985* letter from James W. Reapsome, Executive Director, Evangelical Missions Quarterly.

69. *December 23, 1985* letter from Congressman Bernard J. Dwyer.
70. *December 18, 1985* letter from Edgar F. Westrum Jr., Professor of Chemistry, University of Michigan.
71. *December 23, 1985* letter from James Campbell to Postmaster General Carlin for the International Remail Committee opposing the October 1985 proposed rulemaking, and Louis Cox's *January 7, 1987* response.
72. *January 6, 1986* letter from Thomas W. Childs IV, Associate Director, Cyrus J. Lawrence Incorporated.
73. *December 16, 1985* letter from Michael A. Guidice, Marketing Manager, Business Trend Analysts.
74. *December 19, 1985* letter from George C. Bradford, General Secretary, Presbyterian & Reformed Renewal Ministries International.
75. *December 5, 1985* letter from Jerry Floom, President Jet Courier International (originally sent to Senator Paul Simon), *January 2, 1986* letter from Senator Simon to James Hitaffer, U.S.P.S., and *January 10, 1986* response to Senator Simon.
76. *January 10, 1986* letter from Congressman Frank Wolfe and *January 31, 1986* response.
77. *January 21, 1986* letter from Laurel B. Kamen and Richard W. Coughenour of The New Postal Policy Council, and the *February 14, 1986* response by Postmaster General Casey.
78. *January 23, 1986* letter from Congressmen Mickey Leland, Frank Horton, Robert Garcia to John McKean, Chairman, U.S.P.S. Board of Governors.
79. *January 29, 1986* letter from Alice J. Irby, Vice President, Educational Testing Service.
80. *February 3, 1986* letter from Senator Rudy Boschwitz.

- 81. *February 12, 1986* letter from Congressman Raymond J. McGrath, and *March 7, 1986* response.
- 82. Letter dated *February 28, 1986* from James C. Miller, Director of the Office of Management and Budget. Includes *March 11, 1986* response from Postmaster General Albert Casey.
- 83. *February 28, 1986* from Malcolm Baldrige, Secretary of Commerce, with response of *March 11, 1986* from Postmaster General Casey.
- 84. *February 27, 1986* letter from Beryl W. Sprinkel, Chairman of the Council of Economic Advisers, with *March 11, 1986* response from Postmaster General Casey.
- 85. *February 26, 1986* letter from Edwin Meese III, Attorney General, Dept. of Justice, with *March 11, 1986* response by Postmaster General Casey.
- 86. *February 24, 1986* letter from Congressman Mervyn M. Dymally.

(End of Comments received after  
October 1985 Proposed Rulemaking)

- 87. *October 22, 1985* Federal Register Notice: Correction of Proposed Rule-Change of Phone Number.
- 88. *November 8, 1985* Federal Register Notice. Proposed Rule; Extension of comment period.
- 89. *Minutes of March 3-4, 1986* USPS Board of Governors Meeting with *March 4, 1986* statement by Chairman John R. McKean.
- 90. *March 21, 1986* Federal Register Notice: "Withdrawal of proposed rule; advance notice of proposed rulemaking and request for information."

Comments received after the March 21, 1986 notice:

- 91. *March 19, 1986* letter from James W. Reapsome, Executive Director, Evangelical Missions Quarterly.
- 92. *March 20, 1986* letter from Glenda Peters, Supervisor, Mailing Service ARMCO Corporate Offices.
- 93. *March 26, 1986* letter from Congressman Mickey Leland to Chairman John McKean.
- 94. *March 27, 1986* letter from Congressman Mikey Leland to Chairman John McKean and *April 23, 1986* response.
- 95. *April 2, 1986* letter from John Bolton, Assistant Attorney General, Justice Department, to Senator Alfonse D'Amato. (forwarded to General Counsel of Postal Service).
- 96. *April 11, 1986* letter from Congressman Charles E. Bennett to Postal Service.
- 97. *April 28, 1986* letter from Vincent A. Liguori, Assistant Vice President, the Morgan Bank.
- 98. *April 30, 1986* letter from Michael P. Esposito, Jr., Executive Vice President and Controller, Chase Manhattan Bank.
- 99. *April 29, 1986* letter from Laurel B. Xamen, Chairman and Richard W. Coughenour, Vice Chairman, The New Postal Policy Council.
- 100. *April 30, 1986* letter from Robert S. Taylor, enclosing comments of Newsweek, Inc.
- 101. *April 29, 1986* letter from Frederick W. Smith, Chairman, President and Chief Executive Officer, Federal Express.
- 102. *April 30, 1986* letter from James I. Campbell, Jr., International Remail Committee.
- 103. *April 30, 1986* letter from John J. Gill, General Counsel, American Bankers Association.

104. *May 1, 1986* letter from Ronald Reagan to Postmaster General Casey.

105. *May 1, 1986* letter from Armando Labrada, Vice President and Assistant General Counsel, Purolator Courier.

106. *May 2, 1986* letter from Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, Justice Department.

(End of Comments received after  
March 21, 1986 *Federal Register* notice.)

107. *May 12, 1986 Federal Register* Notice: "Notice of public meeting."

108. *Transcript of May 20, 1986* Public Meeting.

109. Comments of the International Remail Committee, *May 30, 1986*.

110. *June 17, 1986 Federal Register* Notice: Proposed Rule, "Restrictions on Private Carriage of Letters; Proposed Suspension of the Private Express Statutes, International Remailing."

Comments received after the June 17, 1986 notice:

111. *July 7, 1986* letter from Laurel B. Kamen, Chairman and Richard W. Coughenour, Vice Chairman of The New Postal Policy Council.

112. *July 1, 1986* letter from Carl M. Wright, Assistant Vice President, First National Bank of Chicago.

113. *July 15, 1986* letter from Mark R. Allen, Senior Attorney, Federal Express.

114. *July 17, 1986* letter from Douglas Ginsburg, enclosing comments from the Department of Justice.

115. *July 17, 1986* letter from Michael P. Esposito, Jr., Executive Vice President, Chase Manhattan Bank.

116. *July 17, 1986* letter from Peter N. Hiebert, enclosing comments of DHL Airways, Inc.

117. *July 17, 1986* letter from Robert S. Taylor, enclosing comments of Newsweek, Inc.

118. *July 17, 1986* comments from the International Remail Committee (James I. Campbell, Jr., Counsel).

119. *July 21, 1986* comments from Anton G. Hajjar, Counsel for American Postal Workers Union and Richard Gilberg, Counsel for National Association of Letter Carriers.

(End of comments received after the June 17, 1986 notice.)

120. *August 1985* Report on the Status of International Mail (Agency Background Knowledge.)

121. *August 20, 1986 Federal Register* Notice: Final Rule, "Restrictions on Private Carriage of Letters; Suspension of the Private Express Statutes; International Remailing.

Post-Rule Correspondence:

122. *October 6, 1986* letter from Moe Biller, President, American Postal Workers Union, to Postmaster General Preston Tisch and *October 23, 1986* response.

123. *June 1, 1987*, Petition by the American Postal Workers Union, AFL-CIO and the National Association of Letter Carriers, AFL-CIO, requesting reconsideration of the suspension promulgated on August 20, 1986.

124. *June 8, 1987* Letter from Charles D. Hawley, Assistant General Counsel, U.S.P.S., to Anton G. Hajjar Attorney for the American Postal Workers Union, AFL-CIO.

125. *June 11, 1987* letter from Anton G. Hajjar to Charles D. Hawley, in response to June 8, 1987 letter.

126. July 28, 1987 response from Mr. Hawley on behalf of the Postal Service, denying the Unions petition for reconsideration of the August 20, 1986 suspension.

127. Page 25 of the Annual Report of the Postmaster General, 1985 (Agency Background).

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO AND NATIONAL ASSOCIATION  
OF LETTER CARRIERS, AFL-CIO,  
*Plaintiffs*

v.

UNITED STATES POSTAL SERVICE,  
*Defendant.*

Civil No. 87-3199  
(Richey, J.)

DECLARATION

I, KENNETH D. WILSON, in lieu of an affidavit as permitted by 28 U.S.C. 1746, declare under penalty of perjury that the following is true.

1. I am the Director of the Clerk Division, American Postal Workers Union, AFL-CIO, ("APWU") and have held this position for three years. Prior to that, I was Assistant Director of the Clerk Craft for eight years. I was a postal worker for 31 years until my retirement on October 1, 1987.

2. The APWU is the recognized exclusive collective bargaining representative of employees in four craft units nationwide: clerk, maintenance, special delivery messenger and motor vehicle service. The National Association of Letter Carriers, AFL-CIO ("NALC") is the exclusive collective bargaining representative of city letter carriers nationwide. All these crafts are affected by the volume of international mail.

3. Among the duties of city letter carriers and special delivery messengers is the collection of mail pieces, including international mail, deposited in city collection boxes or handed

directly to them by postal patrons. These are brought to a facility for sortation. If the pieces collected by city letter carriers are brought to a station or branch, it is probable that a member of the motor vehicle service craft will transport this collection mail to a general mail facility. These employees transport mail by truck in bulk. Members of this craft also maintain the vehicles in the USPS fleet. Also, window clerks sell international postage and accept international mail from the public. At the general mail facility, the mail is culled (a rough separation by size) and canceled, either by a machine or by hand. This operation may be done by a member of either the mail handler or the clerk craft. (APWU is not the exclusive representative of the mail handler craft but does have members in this craft.) A piece of outgoing international mail, during the primary distribution (by letter sorting machine ("LSM"), optical character reader ("OCR"), or by hand) is sorted by a member of the clerk craft to a foreign mail hold-out. LSM and OCR operators are members of the clerk craft.

4. A secondary sort is then performed by a member of the clerk craft on an LSM, OCR or by hand, by country or other foreign location (e.g. city). These machines are maintained by members of the maintenance craft, which also supply custodial services to postal facilities. A clerk puts it in a container for transportation to a dispatch point. Most likely a member of the motor vehicle craft would take the container to the domestic airport.

5. The container is then transported by air to a gateway facility of the USPS. This could be for surface (sea) transportation (e.g. the New York Foreign and Bulk Mail Center) or air (e.g. the Air Mail Facility ("AMF") at JFK International Airport). There are many AMFs in the postal system. At these facilities, clerks have various functions. For example, an Air Records Processor will scan the mail to generate a label and a

bill of lading or manifest for the airline carrying the mail overseas.

6. Attached as Attachment A is the USPS's ISAL Service Guide. It explains one of the USPS's bulk international mail systems. Clerks would certainly be involved in ISAL operations. Clerks would process the various forms identified in the Guide, maintain the account balances, issue the permits and verify the mailings. Motor Vehicle operators may also transport ISAL shipments from an acceptance facility to the airport.

7. The Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, required the USPS among other things, to pay \$510 million and \$735 million in FY 1988 and 1989, respectively, into certain U.S. Treasury accounts, and to reduce operating expenses by \$160 million in FY 1988 and 270 million in FY 1989. The USPS was prohibited from meeting these requirements by raising rates (beyond the rate increase recently implemented) or by borrowing. Thereafter, the USPS made these cuts, among other things, by reducing retail window and mail processing hours, directly affecting both services to the public and the schedules and pay of bargaining unit employees. In many areas of the country, post offices have been closed on Saturdays and mail processing curtailed on Sundays. See, e.g., Attachment B.

Dated: April 25, 1988

KENNETH D. WILSON

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION,  
ALF-CIO, and NATIONAL ASSOCIATION  
OF LETTER CARRIERS, AFL-CIO

*Plaintiffs,*

v.

UNITED STATES POSTAL SERVICE,  
*Defendant.*

DECLARATION OF JACK L. RUTNER

I, Dr. Jack L. Rutner, in lieu of an affidavit as permitted by 28 U.S.C. 1746, declare under penalty of perjury that the following is true.

1. I hold a Bachelor of Science degree from Massachusetts Institute of Technology and was awarded a Ph.D. in economics from the University of Chicago in 1974. I am Senior Vice President of the economic consulting firm of Joel Popkin and Co. in Washington, D.C.

2. I have reviewed the cost and revenue data in Postal Rate Commission Dockets R84-1 and R87-1. These data are consistent with the hypothesis that there has been "skimming" of volume in the class of International Mail. Opportunities for "skimming" occur when the marginal cost to the Postal Service of processing a class of mail is below the price charged by the Postal Service for that class of mail.

3. Marginal cost is very difficult to calculate properly from the published data, but one can conclude that skimming has occurred by examining how attributable costs in one class behave in comparison with attributable costs in another class. With the exception of one minor category (government mail), the attributable costs per piece of International Mail has in-

creased much more rapidly than the attributable cost per piece of any other class of mail in the period from the test year of Docket R84-1 (FY 1985) to the test year of Docket R87-1 (FY 1989).

For example:

	FY 1985	FY 1989	% Change
International Mail	75.8¢	108.2¢	42.6%
1st Class Letter Mail	14.9¢	17.4¢	16.8%
2nd Class Regular Mail	12.1¢	14.0¢	15.7%
3rd Class Regular Mail	7.3¢	9.4¢	28.8%
Parcel Post	239.2¢	293.5¢	22.7%

(Source:

Docket R84-1, Appendix G, Schedule 1 (Attachment A)

Docket R87-1, Appendix G, Schedule 1 (Attachment B))

4. These data are consistent with the hypothesis that some volume of international mail which is relatively inexpensive to sort has been diverted from the Postal Service. When such skimming occurs, the Postal Service must ultimately either pass on the increased costs to the remaining international mailers or shift those cost increases to the users of other classes of mail by increasing their rates more than the amount accounted for by cost increases within their class. By comparing revenues per piece in FY 1985 and FY 1989, one observes that revenue per-piece of International Mail has increased only 18.6%, which is substantially below the increase in attributable costs for the same time period. If revenue per piece does not increase as rapidly as attributable cost per piece, then some of the institutional costs of the Postal Service which are borne by International Mail will be shifted to other categories of mail. This means that these rates will increase more rapidly than costs justified by those categories.

Dated: 6/9/88

Jack L. Rutner

(A)  
No. 89-1416

Supreme Court, U.S.  
**FILED**  
**JUL 27 1990**  
JOSEPH F. SPANIEL, JR.  
CLERK

In The  
**Supreme Court of the United States**

October Term, 1990

AIR COURIER CONFERENCE OF AMERICA,  
*Petitioner,*

v.

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, et al.,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

**BRIEF FOR PETITIONER**

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## QUESTIONS PRESENTED

1. Are postal employees within the "zone of interest" of the Private Express Statutes that establish and allow the United States Postal Service to suspend restrictions on the private carriage of letters when "the public interest requires?"

2. Did the Postal Service act unreasonably, arbitrarily, or capriciously in promulgating its international remail regulation under the "public interest" standard for suspending the Private Express Statutes where it found no adverse effects on revenues and found general benefits to the public, competition, and users of remail services?

## LIST OF PARTIES

In addition to the parties named in the caption, the parties below included the United States Postal Service (Postal Service) and the National Association of Letter Carriers, AFL-CIO (NALC). The Air Courier Conference of America (ACCA) is a trade association with approximately 150 members. Respondent, the American Postal Workers Union (APWU) and NALC will be referred to jointly as the "Unions."

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In The  
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October Term, 1990

AIR COURIER CONFERENCE OF AMERICA,  
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AMERICAN POSTAL WORKERS UNION,  
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*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

**BRIEF FOR PETITIONER**

**OPINIONS BELOW**

1. Restrictions on Private Carriage of Letters; Suspension of the Private Express Statutes; International Remailing, Final Rule, United States Postal Service, 51 Fed. Reg. 29,636 (August 20, 1986), Joint Appendix (Jt. App.) 97 to 106 (International Remail Rule).
2. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, No. 87-3199, slip op. (D.D.C. February 26, 1988), Order granting Air Courier Conference of America's motion to intervene, Petition for Writ of Certiorari Appendix Pet. App. 27a.

3. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 701 F. Supp. 880 (D.D.C. 1988), Pet. App. 27a to 38a.

4. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 891 F.2d 304 (D.C. Cir. December 8, 1989), Pet. App. 1a to 18a.

### JURISDICTION

The order of the court of appeals was entered on December 8, 1989. The petition for a writ of certiorari was filed on March 8, 1990. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Air Courier Conference of America (ACCA) was a party below. See district court order granting ACCA's motion to intervene (February 26, 1988), Pet. App. 27a; ACCA's Entry of Appearance in the court of appeals (February 6, 1990). Certiorari was granted on June 4, 1990.

ACCA members engage in international remail pursuant to the Postal Service regulation at issue, 39 C.F.R. § 320.8. ACCA has standing pursuant to *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), and *International Union, UAW v. Brock*, 477 U.S. 274, 288-290 (1986).

### RELEVANT STATUTES AND REGULATIONS

The statutory restrictions on the private carriage of letters, referred to below as the Private Express Statutes (PES), include 18 U.S.C. §§ 1693-1699, 1729 (1982) and 39 U.S.C. §§ 601-606 (1982), and provide in pertinent part as follows:

18 U.S.C. § 1696. Private express for letters and packets

(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over

any post route which is or may be established by law, or from any city, town or place to any other city, town or place, between which mail is regularly carried, shall be fined not more than \$500 or imprisoned not more than six months, or both.

This section shall not prohibit any person from receiving and delivering to the nearest post office, postal car, or other authorized depository for mail matter any mail matter properly stamped.

(b) Whoever transmits by private express or other unlawful means, or delivers to any agent thereof, or deposits at any appointed place, for the purpose of being so transmitted any letter or packet, shall be fined not more than \$50.

(c) This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only. Whenever more than twenty-five such letters or packets are conveyed or transmitted by such special messenger, the requirements of section 601 of title 39, shall be observed as to each piece.

The regulation at issue was promulgated by the United States Postal Service pursuant to 39 U.S.C. § 601, which provides as follows:

39 U.S.C. § 601. Letters carried out of the mail

(a) A letter may be carried out of the mails when—

(1) it is enclosed in an envelope;

(2) the amount of postage which would have been charged on the letter if it had been sent by

mail is paid by stamps, or postage meter stamps, on the envelope;

- (3) the envelope is properly addressed;
- (4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;
- (5) any stamps on the envelope are canceled in ink by the sender; and
- (6) the date of the letter, of its transmission or receipt by the carrier is endorsed on the envelope in ink.

(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

The Postal Service's International Remail Rule, 39 C.F.R. § 320.8 (1990), the regulation at issue, provides in pertinent part:

§ 320.8 Suspension for international remailing.

(a) The operation of 39 U.S.C. § 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

(b) This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

(c) Violation by a shipper or carrier of the terms of this suspension is grounds for administrative revocation of the suspension as to such shipper or carrier for a period of one year in a proceeding

instituted by the General Counsel in accordance with Part 959 of this chapter. The failure of a shipper or carrier to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service for the purpose of determining compliance with the terms of this suspension shall be deemed to create a presumption of a violation for the purpose of this paragraph (c) and shall shift to the shipper or carrier the burden of establishing the fact of compliance. Revocation of this suspension as to a shipper or carrier shall in no way limit other actions as to such shipper or carrier to enforce the Private Express Statutes by administrative proceedings for collection of postage (see § 310.5) or by civil or criminal proceedings.

## STATEMENT OF THE CASE

### 1. Statutory Background

Restrictions on the private carriage of letters in the United States originate in the postal monopoly conferred by the Crown in Elizabethan England, more as a security than an economic measure. Although the Articles of Confederation granted Congress an "exclusive right" to establish post offices, the Constitution merely gave Congress the power to establish "Post Offices and Post Roads." Restrictions on private expresses are therefore statutory, not constitutional.<sup>1</sup>

Congress enacted restrictions on the private carriage of letters in piecemeal fashion with legislation in 1789, 1792, 1825, 1827, 1845, 1852, and 1872. The current Private Express

<sup>1</sup> Priest, *The History of the Postal Monopoly in the United States*, 13 J. Law and Economics 33, 35, and 45 (1974); J. Haldi, *Postal Monopoly: An Assessment of the Private Express Statutes* 3 (1974).

Statutes (PES),<sup>2</sup> virtually unchanged since 1872,<sup>3</sup> are based on the 1909 recodification of the criminal provisions and recodification of the civil provisions without debate or substantive change in the 1970 Postal Reorganization Act (PRA), 39 U.S.C. § 101 *et seq.* (1982).<sup>4</sup>

The PRA was the result of the public and business community's demands for more efficient and dependable postal services.<sup>5</sup> The Kappel Commission on Postal Reform appointed by President Johnson issued a report in June 1968 recommending sweeping changes in the postal system to make it more efficient and businesslike and less political.<sup>6</sup> Most of the Commission's recommendations were soon incorporated into proposed legislation that was vigorously opposed by the

<sup>2</sup> Although the Postal Service's convention of referring to the statutory restrictions on the private carriage of letters as the "Private Express Statutes" or "postal monopoly laws" is continued here, that terminology injects a certain pro-monopoly bias into any discussion. The piecemeal enactment of the various restrictions belies the aura of a unified body of law that either designation implies. Moreover, equating the PES with a "postal monopoly" obscures the single most elastic source of penal sanctions against the private carriage of letters, namely the Postal Service's historical expansion of the definition of "letters" by regulation. See *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824, 831 (D.C. Cir. 1979) (Wilkey, J., dissenting).

<sup>3</sup> Priest, *supra* n.1, at 67 n.168.

<sup>4</sup> H.R. Rep. No. 1104, 91st Cong., 2d Sess. 44 (1970) ("this chapter [14 of PRA] continues without substantive change the portion of the private express statutes found in existing chapter 9 of title 39"). For more complete statutory history, see footnote 43, *infra*.

<sup>5</sup> *Report of the President's Commission on Postal Organization: Entitled "Toward Postal Excellence"* (June 1968), House Committee on Post Office and Civil Service, 94th Cong., 2d Sess., Comm. Print No. 94-25 (November 24, 1976) (Kappel Report) at 12-13; J. Tierney, *Postal Reorganization: Managing the Public's Business* 2 (1981).

<sup>6</sup> Kappel Report, *supra* n.5, at 2-3.

postal employees' unions.<sup>7</sup> While postal reform legislation was pending in 1969, legislation was also introduced to raise postal employee wages. Postal employee unions favored a wage increase but opposed combining the postal reform and pay increase bills.<sup>8</sup> The bills were nonetheless combined and eventually endorsed by the unions after the addition of provisions for retroactive pay increases and faster track to higher pay levels, to the original prospective wage increase provision.<sup>9</sup>

## 2. Administrative Proceedings

The 1970's saw increased demand for faster, more reliable business communications and the emergence of private air couriers offering overnight delivery to meet that demand. The Postal Service responded by threatening couriers with action to enforce the PES; harassing courier customers with demands for postage on their courier shipments; and initiating Express Mail Service to compete with private air couriers.<sup>10</sup> The couriers in

<sup>7</sup> *Hearings before the House Committee on Post Office and Civil Service*, 91st Cong., 1st Sess. 742 (1969) (testimony of James H. Rademacher, President, National Association of Letter Carriers) ("postal corporation ... would be a nightmare for almost every segment of our population"). See also Dolenga, *An Analytical Case Study of the Policy Formation Process (Postal Reform and Reorganization)* 520, 530-531 (1973).

<sup>8</sup> *Hearings of the Senate Committee on Post Office and Civil Service*, 91st Cong., 1st Sess. (statement of James A. Rademacher, President National Association of Letter Carriers, AFL-CIO) ("no logical reason for tying badly needed pay raise for our people with the postal reform legislation").

<sup>9</sup> *Explanation of the Postal Reorganization Act and Selected Background Material*, prepared by the Senate Committee on Post Office and Civil Service, 94th Cong., 1st Sess. 3 (Revised July 1975); see also Dolenga, *supra* n.7, at 549.

<sup>10</sup> *Hearings on the Private Express Statutes before the Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 32-37 (statement of Frederick W. Smith); 206-207 (statement of James I. Campbell) (1979).

turn asked Congress for legislation to exempt urgent letters from the PES.<sup>11</sup> In 1979, the Postal Service preempted proposed legislation by promulgating a regulation suspending the PES for "extremely urgent letters." 39 C.F.R. § 320.6, 44 Fed. Reg. 61, 181 (October 24, 1979).

In the early 1980's the demand for faster, more reliable and cheaper business communication expanded internationally.<sup>12</sup> Air couriers began to offer international door-to-door air courier services. Some couriers and airlines began to offer international remail services. Rather than delivering a shipment directly to the addressee as with door to door service, remailers delivered multiple business letters or printed documents in bulk to a foreign post office for delivery in that or other countries. The Postal Service objected to remail; sought but was denied Justice Department enforcement action under the PES;<sup>13</sup> and in 1985, under the guise of "clarifying" the 1979 urgent letter rule, proposed a regulation that would have declared remail unlawful under the PES. 50 Fed. Reg. 41,462 (October 10, 1985), *Jt. App.* 2.

The Postal Service's proposed anti-remail regulation drew intense and virtually unanimous opposition. Opponents included the Reagan Administration, Congress, the remail industry and its customers. The Department of Justice opposed the regulation: (1) voicing doubts that the PES even applied to international mail; and (2) concluding that international remail does not undermine the purposes of the PES:

<sup>11</sup> See *Report of the Senate Comm. on Governmental Affairs on the Postal Service Amendments Act of 1978*, S. Rep. No. 1191, 95th Cong., 2d Sess. 17-21 (1978) (reporting favorably an amendment to exempt urgent letters from the postal monopoly); *Hearings on the Private Express Statutes before the Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. (1979) (House committee members expressing frustration with resistance to an exemption for urgent letters from the Postmaster General).

<sup>12</sup> See comments of International Remail Committee, *Jt. App.* 9.

<sup>13</sup> Statement of Walter Duka, Assistant Postmaster General, Int'l Postal Affairs, to Postal Service Board of Governors, Tr. 49-50 (September 6, 1985).

A number of factors raise doubts as to whether Congress intended to extend the Postal Service monopoly to international mail. In the first instance, the plain language of the Private Express Statutes grants the Postal Service a monopoly over domestic carriage. With respect to an international monopoly the statutes are silent. Given the national economic policy of fostering competition, the courts will require a clear expression of congressional intent to create a monopoly, or otherwise restrict competition. Unless it were necessary to give the Postal Service a monopoly over international mail in order to effectuate some domestic policy goal, like "universal service," the courts would not impute to Congress an intent to create a monopoly over international mail. As we indicate in Section B.2, *infra*, there is no evidence that granting the Postal Service a monopoly over international mail is necessary in order to provide domestic universal service or any other domestic goal of Congress.

*Jt. App.* 28-29.

The Office of Management and Budget and the Department of Commerce raised other economic and competition policy concerns, invoked the public interest, and argued against the proposed rule on grounds of potential harm to the international competitiveness of American firms. (*Jt. App.* 43-47).

Several members of Congress argued against the proposed anti-remail rule. Three members of the Committee on Post Office and Civil Service, House Subcommittee on Postal Operations and Services, including its chairman and ranking minority member, wrote that "the Subcommittee finds no justification or basis for the action proposed by the USPS." *Jt. App.* 41, 53.

Members of the remail industry and its customers opposed the proposed anti-remail rule on legal, public policy, international competitiveness and business grounds. The International Remail Committee submitted a detailed analysis of revenue impact, concluding it would have little if any impact on Postal Service revenues. At worst, the then estimated \$ 60 million annual remail business represented a net loss of no more than \$ 3 million or 0.025 percent of net Postal Service revenues. Jt. App. 8. The Committee also analyzed international remail in light of the Board of Governors 1973 Report on the PES and found no inconsistency between remail and the purposes of the PES articulated by the Board. *Id.* at 12-16. The Committee also submitted the favorable results of a poll of large mailers. *Id.* at 9-11.

Responding to this opposition, the Postal Service in March 1986 withdrew the proposed anti-remail rule and announced its intention to propose an alternative, pro-remail rule. 51 Fed. Reg. 9652 (March 21, 1986), Jt. App. 50. The withdrawal announcement included the following statement by John R. McKean, Chairman of the Postal Service Board of Governors:

Congress entrusted us with this monopoly not for our own benefit but in order to let us better serve the American people. The critical question raised by this rulemaking is whether enforcement of the monopoly in this context would advance or retard consumer welfare and the interests of this nation.

It is the sense of the Board that private sector competition with the Postal Service in the provision of international remail services can - and already does - produce significant benefits to the public. Ultimately even the Postal Service itself can benefit from this kind of competition.

• • •

The Board of Governors does not believe that any attempt to suppress this kind of competition

would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people.

51 Fed. Reg. at 9853, Jt. App. 55-56.

On June 17, 1986 the Postal Service proposed a new rule suspending the PES "to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States." 51 Fed. Reg. 21,929 (June 17, 1986), Jt. App. 75. The Department of Justice "strongly endorsed" the proposed regulation as "based on an ample factual record that demonstrates that *competition in international remail is in the public interest.*" Jt. App. 83 (emphasis added).

The only opposition to the new remail rule came from the postal employees' unions. However, apart from allegations that "APWU and NALC members are directly affected in their employment opportunities, and as members of the public and users of the mails," Jt. App. 85, the unions confined their comments to legal arguments regarding the PES, Jt. App. 86-89, the public interest requirement in the suspension provision, Jt. App. 91-92, and the quality of the administrative record. Jt. App. 92. Rather than offer any evidence of harm to the public interest, the Unions sought delay for further study by the Postal Service. Jt. App. 95. The Unions offered no cost analysis, projections of effects on net postal revenues or any rebuttal to the International Remail Committee's analyses and polling results.

The remail rule issued on August 20, 1986 substantially as proposed. 51 Fed. Reg. 29,636, Jt. App. 97. The Postal Service's statement issuing the final rule noted that eight of the nine additional comments submitted in response to its June 17 notice expressed support for the proposal, Jt. App. 98, and that:

After careful consideration of all the comments including those submitted in previous related proceedings, the Postal Service, also bringing to the process its knowledge of and experience with the international mails, has concluded that the proposed suspension should be adopted without substantial change or modification.

Jt. App. 98.

### 3. Decisions Below

On November 25, 1987, the Unions filed suit in district court for declaratory and injunctive relief against enforcement of the international remail rule on grounds that the Postal Service had acted arbitrarily and capriciously in adopting it. The district courts have original jurisdiction over suits against the Postal Service under 39 U.S.C. § 409 (1982).

On December 20, 1988, the district court granted the Postal Service's motion for summary judgment in which intervenor ACCA had joined. Pet. App. 28a. Judge Richey held that, while the Unions had Article III standing, they nonetheless lacked standing to sue because they were not within the "zone of interest" of the PES. On the merits, the district court held that even if the Unions had standing, (1) the Postal Service had not exceeded its suspension authority under the Unions' "heightened interpretation" of the 39 U.S.C. § 601(b) "public interest requires" standard and (2) the remail rule was not arbitrary, capricious nor an abuse of discretion because the Postal Service had "identified the factors supporting its decision, drawn rational inferences where detailed facts did not exist, and drawn a rational connection between the facts and the decision made." Pet. App. 37a. The Unions appealed.

On December 8, 1989, the court of appeals vacated the summary judgment for the Postal Service. The District of Columbia Circuit held that the zone of interest of the PES,

though dating back to 1792, had to be viewed in the context of the entire statutory framework of the 1970 Postal Reorganization Act (PRA). 39 U.S.C. § 101 *et seq.*, Pub. L. 91-375 (August 12, 1970), of which, the court said, "the PES are a part." The court then found that "a key impetus for the PRA appears to have been a nationwide work stoppage by postal employees which occurred in March 1970" and "[t]herefore a principal purpose of the PRA was to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees." Pet. App. 8a. This "interplay" between the PES and PRA persuaded the court "that there is an 'arguable' or 'plausible' relationship" between the PES's goal of universal postal service and the employment interests of the Unions. Pet. App. 8a-9a.

Alternatively, the court held that even without the interplay between the PES and PRA, the Unions would be in the zone of interest of the PES because "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities." *Id.* Therefore, the court concluded, the Unions have standing because their "interests are largely congruent with the purposes of the PES." *Id.* 10a.

The court of appeals then concluded that the Postal Service applied the § 601(b) public interest test too narrowly by considering only the benefits of the international remail rule and only to the segment of the Postal Service's consumer base that engaged in international commerce. The court held that the Postal Service's "interpretation of the 'public interest' is not reasonable because it did not give sufficient attention to how revenue losses might affect cost and service of other postal patrons." *Id.* 14a.

The court of appeals therefore remanded the case to the district court with instructions to vacate the grant of summary judgment and to allow the Postal Service to reopen its Interna-

tional Remail Rule proceeding or to take any other action consistent with its ruling. Pet. App. 16a.

ACCA petitioned for writ of certiorari on March 8, 1990. The Court granted ACCA's petition on June 4, 1990.

### SUMMARY OF ARGUMENT

I. The court of appeals erred in holding that the Unions had standing to enforce the PES under the zone of interest test.

First, the court of appeals misconstrued the zone of interest test. The court eviscerated the zone of interest test by construing it to confer standing to sue where the plaintiff's interests are merely "congruent" with the purposes of the statute the plaintiff seeks to enforce. By ignoring the requirement that a plaintiff establish that it is among the class Congress intended to enforce the statute or, at the very least, that Congress intended it to benefit by that statute, the court below, in effect, reduced the "prudential" zone of interest test to a redundant injury in fact analysis. In addition, the court extended the zone of interest of a statutory scheme from those directly affected by it and their competitors to a secondary level of those merely employed by the party subject to the regulatory scheme.

Second, the court of appeals misconstrued the legislative history of the PES. The court, by focussing on the "revenue protective" features of the 1792 Act, ignored the fact that (1) the narrow prohibitions of the 1792 Act did not establish a "postal monopoly," (2) the 1792 Act, enacted at a time when the General Post Office was part of the Treasury, was a general revenue provision pursuant to congressional taxing authority, and (3) the Act could not have benefited postal employees, because the Post Office had yet to establish the services that require substantial employment or to obtain authority to hire letter carriers.

Third, the court of appeals failed to examine the legislative history of the 1845 Act, the only occasion on which Congress debated the PES. That legislative history demonstrates that restrictions on private carriage were enacted for two reasons. One goal was to prevent individuals in outlying regions from taking commercial and political advantage of news travelling faster by private means than the Post Office could deliver it by mail. Another goal was to unify the country by allowing the Post Office to generate sufficient revenues, by eliminating competition, to expand mail service to the frontier and subsidize that service. Revenue protection, cross-subsidization of rates, and the prevention of "cream-skimming" by private express were merely the means by which Congress intended to support the costs of its nation-building goal.

Fourth, a number of provisions that remain in the PES today demonstrate that, to the extent that the PES's revenue protective measures are even separable from their intended purposes, they do not subsume the interests of postal employees. Since the earliest days, Congress permitted contracting out of transportation services, competition from special messengers, private carriage of letters without charge, and private carriage if regular postage is paid.

Fifth, the court of appeals erred by relying on the 1970 Postal Reorganization Act to define the zone of interest of the Private Express Statutes. In so doing, (1) the court unnecessarily reached beyond the PES and its legislative history to redefine the PES's unambiguous zone of interest. (2) The court unnecessarily substituted an undefined "interplay" test for this Court's requirement of a "single unified purpose" between two statutes before one can help define the other's zone of interest. A mere interplay between two laws is insufficient to establish that Congress enacted them for the same reason, particularly where, as here, the PES and PRA operate at cross-purposes. (3) The court erred in finding any relevant interplay between the PRA

and PES given the Unions' vocal opposition to the PRA's enactment.

II. The court of appeals erred, whether the jurisdictional provisions of the Postal Reorganization Act or the Administrative Procedures Act (APA) apply.

The Unions challenged the Remail Rule under the substantive provisions of the PES and asserted jurisdiction under the PRA. The court of appeals considered the Unions' standing under the APA. Because the Unions lack standing under the "generous" APA provisions, they cannot establish standing under the presumably less generous requirements of the PRA.

III. The court of appeals erred in holding that the Postal Service was unreasonable, arbitrary and capricious in promulgating the international remail rule.

The court burdened the PES's public-interest based suspension provision with the requirement that the Postal Service consider the effects of the remail rule on the cost and service of all postal patrons, in addition to the general benefits to the public, to competition, to international competitiveness and to users of remail that the Postal Service found. Inasmuch as the court addressed no legal issue with respect to the public interest standard of the suspension provision, it was unnecessary for the court to address the PES's purposes to determine the reasonableness of the Postal Service's interpretation of the public interest.

## ARGUMENT

### I.

#### THE UNIONS LACK STANDING BECAUSE POSTAL WORKERS ARE NOT WITHIN THE ZONE OF INTEREST OF THE PRIVATE EXPRESS STATUTES

The Unions' complaint alleges a substantive violation of the PES by the Postal Service in promulgating the international remail rule, Complaint 1, Jt. App. 107, and invokes district court jurisdiction under § 409 of the PRA, 39 U.S.C. § 409 (1970). *Id.* at 108. The court of appeals applied the standards of § 702 of the APA, 5 U.S.C. § 702, to assess the Unions' standing to sue.<sup>14</sup> To establish standing to sue under § 702, a plaintiff must first establish that it has "suffered a legal wrong because of the challenged agency action, or is adversely affected or aggrieved by that action within the meaning of a relevant statute." *Lujan v. National Wildlife Federation*, \_\_\_ U.S. \_\_\_, 58 U.S.L.W. 5077, 5080 (June 27, 1990) (internal punctuation omitted). This has been called the "injury in fact" test.<sup>15</sup> Second, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation

<sup>14</sup> The district court assumed § 702 to apply and the court of appeals applied its standards on grounds of the Postal Service's stated intent to abide by the APA voluntarily. That the Unions actually invoked the district court's jurisdiction under 39 U.S.C. § 409 is immaterial. See discussion at pp. 36 to 37 *infra*.

<sup>15</sup> The district court's finding that the Unions satisfied the injury in fact test was not appealed. However, the Unions' inability to establish any direct effect of the remail rule on employment levels after the rule had been in effect for nearly two years, raises some questions about the injury finding after this Court's decision in *Lujan*. See also *Atlantic Richfield Co. v. USA Petroleum Co.*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 1884, 1889 (1990) (private plaintiff has no standing to recover damages under antitrust laws merely by showing injury causally limited to an illegal presence in the market).

forms the legal basis of his complaint." *Id.*, citing *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396-397 (1987).

A. The Court of Appeals' Interpretation Effectively Eliminates the Zone of Interest Test

1. Congruence of Interests and Effect is Insufficient to Establish Congressionally Intended Benefits

The court of appeals erred in holding that a mere "congruence" of the PES's revenue protective goals with postal employees' interests bring postal employees within the zone of interest of the statute. In so doing, the court in effect abandoned the "prudential" element of the zone of interest test and reformulated it into a redundant injury in fact test.

The court of appeals' critical step in virtually eliminating the zone of interest test is found in its statement that:

[C]ongressional intent to benefit the Unions is not required. [Citing *Clarke, supra*, at 400 n.15.] That postal workers benefit from the PES's function in ensuring a sufficient revenue base, however, is scarcely deniable. Thus, the Unions' interests arguably are within the zone of interests contemplated by the PES. . . . The relationship of the plaintiff to the statute need only be arguable, not wholly coincident. Instead of requiring an *a priori* showing that no conflicts could possibly ensue from a grant of standing, the zone of interests inquiry only "seeks to exclude those plaintiffs whose suits are more likely to frustrate than further statutory objectives." *Clarke*, 479 U.S. at 397 n.12

Pet. App. 9a.

First, the court of appeals' reliance on footnotes 12 and 15 in Part II of *Clarke*, which the concurring Justices refused to join as "as a wholly unnecessary exegesis on the 'zone of interest test,'" *id.* at 410, is misplaced in light of *Lujan v. National Wildlife Federation*, \_\_\_ U.S. \_\_\_, 58 U.S.L.W. 5077, 5080 (June 27, 1990). In *Lujan* the Court taught:

[T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

This example illustrates that establishment of a congressional intent to benefit postal employees by the PES is a requirement to satisfy the zone of interest test.

Second, the benefits of the PES's revenue protective measures to the Unions is less obvious than the court of appeals found. Indeed, the causal relationship between private competition, postal revenues and postal employment is far more tenuous than the loss of a specific job by a court reporter having an exclusive contract to perform it, as in the *Lujan* example. As noted in ACCA's Petition, a number of entirely conjectural assumptions and PRA ratemaking, policy, and management considerations may intervene in the causal chain. Pet. Cert. at 16 n.16. See *United Transportation Union v. Interstate Commerce Commission*, 891 F.2d 908, 914 (D.C. Cir. 1989) (increased competition has no predictable effect on employment).<sup>16</sup>

<sup>16</sup> Note also that international mail amounts to less than 0.5 percent of Postal Service traffic. See 1985 Annual Report of the Postmaster General.

Third, if the prudential limitation of the zone of interest test is merely a negative option, those whose interests are no greater than the public at large will always be included in the zone, unless specifically excluded by Congress. Such a construction of the zone of interest test places the heavy burden on those drafting legislation to anticipate all who might some day seek to enforce the statute. Moreover, such broadening of standing tends to force the courts to replace the political arena for resolution of difficult public policy questions. See *Community Nutrition Institute v. Block*, 698 F.2d 1239, 1256-57 (D.C. Cir. 1983) (Scalia, J. *dissenting in part*), *reversed*, 467 U.S. 340 (1984).<sup>17</sup>

Finally, if the only purpose of the zone of interest test were to exclude those from standing whose suits would frustrate statutory objectives, as the court of appeals held, resolution of the standing issue in many cases would have to be deferred until a decision on the merits. Deferral of the standing inquiry defeats the purposes of standing tests to act as a sound prudential filter on cases the courts must hear. At least one commentator appears to advocate elimination of standing requirements altogether.<sup>18</sup>

## 2. The Court of Appeals Expanded the Zone of Interest Test to Cover Employees of the Affected Competitors

The court of appeals' view of the zone of interest test improperly expands the zone to include persons only derivatively affected by the agency action.

<sup>17</sup> Indeed, the Unions' original defense of their standing argued that "[s]ince the Private Express Statutes were designed to protect postal revenue for the benefit of the public of a viable nation-wide postal system, any member of the public could challenge the promulgation of a suspension of the monopoly by the Postal Service." Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment (April 24, 1988) at 6-7.

<sup>18</sup> See, e.g., Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988).

The court of appeals' reliance on *Clarke, supra*, and *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), is misplaced. *Data Processing* was a "competitor's" suit, as distinguished from *Flast v. Cohen*, 392 U.S. 83 (1942), a "taxpayer's" suit. *Data Processing* at 152. The Court in *Data Processing* held that the statute at issue regulated competition and that the plaintiff data processors, would-be competitors of banks permitted by the agency action to compete, were within the zone of interest of the statute, even though that was not the type of competition contemplated by the statute. *Id.* at 156. *Clarke* was also a competitor's suit and the Court analogized the facts to those of *Data Processing* on that basis. *Clarke*, 479 U.S. at 403.

*Clarke* and *Data Processing* do not apply here. This is not a taxpayer's suit or a competitor's suit, but an employee's suit under a competition law. The PES is a competition statute that regulates the conduct of competitors of the Postal Service. Indeed, unlike *Data Processing* and *Clarke*, the statutory scheme of the PES contemplates the type, if not the geographic scope, of the competition at issue in the International Remail Rule. The postal *employees* for whose benefit the Unions have brought suit here are not competitors of either the Postal Service or remailers. *Data Processing* and *Clarke* do not support extending the zone of interest under competition laws to *employees* of the competitors affected by agency action.

The court of appeals thus erred by extending the zone of interest to persons only indirectly affected by agency action under the PES. Employees are generally denied standing to enforce competition laws because they lack competitive and direct injury. See, e.g., *Adams v. Pan Am World Airways, Inc.*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934, 961 (1988) (former airline employees denied standing to assert antitrust claim against airline that allegedly drove their former employer out of business); *Curtis v. Campbell-Taggart, Inc.*,

687 F.2d 336 (10th Cir. 1982), *cert. denied*, 459 U.S. 1090 (1983) (employees of corporation injured by anticompetitive conduct denied standing under antitrust laws); *see also National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989). It is difficult to conceive a policy reason why standing to enforce an *anti-competition* law such as the PES should be cast wider than standing to enforce *pro-competition* laws.

B. The Court of Appeals Misconstrued the Legislative History of the Restrictions on Private Carriage

1. Early Restrictions on Private Carriage of Letters Were A Function of Congressional Taxing Authority Which Do Not Implicate Postal Employees' Interests

The court of appeals relied upon the 1792 Act,<sup>19</sup> as "where Congress first embraced the concept of a postal monopoly." Pet. App. at 80.<sup>20</sup> The court found "that the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities." *Id.* at 8a-9a. The court of appeals' reliance on

<sup>19</sup> Act of February 20, 1792, ch. 7, § 14, 1 Stat. 236.

<sup>20</sup> Earlier in 1789, the first Congress reenacted without debate the postal ordinance passed by the Continental Congress in 1782 that actually authorized private carriage of letters on all non-government routes, in spite of the Congress' postal monopoly under the Articles of Confederation. Priest, *supra* n.1, at 48 n.71. "[T]he regulations of the post office shall be the same as they were under the resolutions and ordinances of the late Congress." 1 Stat. 70, 1st Cong., 1st Sess. (1789).

It is also noteworthy that the Post Office at the time was the result of the Continental Congress' take-over in 1775 of the privately-owned Constitutional Post started by a newspaper publisher whose father had been postmaster in the British colonial post office. R. Kielbowicz, *News in the Mail: The Press, Post Office and Public Information, 1700-1860's* 19-22 (1989).

the 1792 Act is misplaced because: (1) its "revenue protective" features were a function of congressional taxing authority under the Constitution; (2) it did not establish a "postal monopoly;" and (3) it did not benefit postal employees.

First, in 1792, what was then known as the General Post Office was part of the United States Treasury. Until Congress began the practice of simply declaring established roads and railroads to be "post roads" in the 1820's and 30's, the Treasury paid for post roads, preferably out of postal revenues.<sup>21</sup> The legislative history of the 1792 Act, though silent as to § 14 specifically, is replete with references to postal rates and revenues as "*taxes*"; suggestions that the establishment of post roads was a congressional function related to its exclusive taxing authority, and discussions of the franking privilege as an improper tax exemption.<sup>22</sup> Congress raised postage rates in 1815 to 1816 by 50 percent to defray the costs of the War of 1812<sup>23</sup> and the Post Office remained an adjunct of the Treasury until 1829.<sup>24</sup> Thus, to the extent that the 1792 restrictions protected revenues, they protected the general tax revenues of the Treasury and its investment in post roads. Postal employees could not have been benefited by, and lack standing to enforce, general tax protective provisions of the 1792 Act. *See ASARCO, Inc. v. Kadish*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2037, 2043 (1989) (suits premised on federal taxpayer status are not cognizable in the federal courts because their interests are too remote); *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 476-482 (1982).

<sup>21</sup> G. Cullinan, *The Post Office Department* 36 (1968).

<sup>22</sup> *Debates and Proceedings in the Congress of the United States*, 2 Cong. Deb. 229-236, 275-277, 284-286, and 291-294 (December 1791) (1834).

<sup>23</sup> Cullinan, *supra* n.21, at 28.

<sup>24</sup> Cullinan, *supra* n.21, at 28-29.

Second, Section 1 of the 1792 Act established certain specific routes — as from Wiscasset, Maine to Savannah, Georgia — as “post roads.” Section 14 limited private carriage of letters on those post roads.<sup>25</sup> Given the finite and limited designation of post roads in § 1 and the exceptions for special messengers and for gratuitous services under § 14, the 1792 Act cannot be said to embody the concept of a domestic postal monopoly. There was in fact no postal monopoly at the time.

Third, in 1792 the Post Office offered no pick-up or delivery services.<sup>26</sup> Statutory authority to employ letter carriers was not enacted until two years later in 1794 and was ignored until the late 1820's.<sup>27</sup> Clearly, the 1792 restrictions on private carriage protected the government's capital investment in the post roads, not the jobs of as yet virtually non-existent postal employees.

The 1825 Act, styled as “An Act to reduce into one the several Acts establishing and regulating the Post-office Department,” repealed the 1792 Act and included a prohibition against

<sup>25</sup> Section 14 provided:

That if any person, other than the Postmaster General, or his deputies, or persons by them employed shall take up, receive, order, dispatch, convey, carry or deliver any letter or letters, packet or packets, other than newspapers, for hire or reward, or shall be concerned in setting up any foot or horse post, wagon or other carriage, by or in which any letter or packet shall be carried for hire on any established post-road, or any packet, or other vessel or boat, or any conveyance whatever, whereby the revenue of the general post office may be injured, every person so offending shall forfeit, for every such offence, the sum of two hundred dollars. *Provided*, That it shall and may be lawful for every person to send letters or packet by special messenger.

<sup>26</sup> See C. Scheele, *A Short History of the Mail Service* 66, 91 (1970).

<sup>27</sup> See Scheele, *supra* n.26, at 66; Cullinan, *supra* n.21, at 28.

the private use of “stage[s]” and “packet boat[s].”<sup>28</sup> In 1827 Congress cured a drafting oversight in the 1825 Act by amending the law to include foot and horse posts.<sup>29</sup> Postal employees cannot have been within the zone of interest of either the 1825 and 1827 Acts because they targeted transportation of mail which even then was contracted out to private carriers.<sup>30</sup> Therefore the 1825 and 1827 Acts did not benefit postal employees.

## 2. The Purposes of the 1845 Act Were to Control the Flow of “Intelligence” and to Integrate the Nation Politically and Economically

The court of appeals completely ignored the 1845 Act. Congress' deliberation of the 1845 Act was the only occasion

<sup>28</sup> Sec. 19 of Chap. LXIV of the Act of March 3, 1825 provided:

That no stage or other vehicle, which regularly performs trips on a post-road, or on a road parallel to it, shall convey letters; nor shall any packet boat or other vessel, which regularly plies on a water declared to be a post-road, except such as relate to some part of the cargo. For the violation of this provision, the owner of the carriage or other vehicle, or vessel, shall incur the penalty of fifty dollars. And the person who has charge of such carriage, or other vehicle or vessel, may be prosecuted under this section, and the property in his charge may be levied on and sold, in satisfaction of the penalty and costs of suit: *Provided*, That it shall be lawful for any one to send letters by special messenger.

IV Public Statutes at Large at 107 (1846) (emphasis added).

<sup>29</sup> Section 3 of Chap. LXI of the Act of March 2, 1827, 19th Cong., 2d Sess., provided:

That no person, other than the Postmaster General, or his authorized agents, shall set up any foot or horse post, for the conveyance of letters and packets, upon any post-road, which is or may be established as such by law; and every person who shall offend herein, shall incur a penalty of not exceeding fifty dollars, for each letter or packet so carried.

<sup>30</sup> W. Fuller, *The American Mail: Enlarger of the Common Life* 150 (1972).

on which the postal monopoly was the subject of substantial debate.<sup>31</sup> The 1845 statute, entitled "An Act to reduce the rates of postage, to limit the use and correct the abuse of the franking privilege, and for the prevention of frauds on the revenues of the Post Office Department,"<sup>32</sup> was the result of three circumstances, none of which involved the interests of postal employees. First, the Post Office Department continued to run substantial deficits in spite of high postage rates.<sup>33</sup> Second, high postal rates enabled private expresses to make substantial inroads into the domestic market for delivery of letters and the 1825 and 1827 Acts proved unsuccessful in prosecuting them.<sup>34</sup> Third, inauguration of the "penny post" in England quadrupled use of the mails and it was argued that substantial reduction of American postal rates would have the dual virtues of driving private expresses out of business and increasing mail volume for the Post Office. This in turn would help reduce the Post Office's deficit.<sup>35</sup>

Sections 9 through 13 of the Act limiting private carriage of letters had two-fold purposes. First, the Postmaster General and the states most distant from the commercial centers of the Northeast believed that the postal monopoly was necessary to prevent users of faster private expresses from taking advantage of early market "intelligence" and news of international affairs that had not yet reached the general populace through the slower

<sup>31</sup> Priest, *supra* n.1, at 45.

<sup>32</sup> Statute II, Chapter XLII, Vol 2 U.S. Statutes at Large 1835-1845, at 732. The provisions relating to private express are in the Appendix hereto.

<sup>33</sup> *Report on Post Office Department Rates of Postage*, H.R. Rep. No. 477, 28th Cong., 1st Sess. 2-3, 5 (1844).

<sup>34</sup> Priest, *supra* n.1 at 60, citing *United States v. Gray*, 26 F. Cas. 18 (Mass. 1840), *United States v. Adams*, 24 F. Cas. 761 (S.D.N.Y. 1843).

<sup>35</sup> 14 Cong. Globe, 28th Cong., 2d Sess. 213 (1845) (remarks of Senators Simmons and Breese). See also H.R. Rep. No. 477, *supra* n.33, at 5.

mails.<sup>36</sup> Proponents also believed in the duty of the government to serve outlying, frontier areas even if it meant doing so below cost.<sup>37</sup> The "revenue protective" provisions were thus

<sup>36</sup> *Report of the Postmaster General to the Senate*, S. Rep. No. 66, 28th Cong., 2d Sess. 3-4 (1845):

The objects and purposes of a public mail are, to convey intelligence, by letter or packets, for all alike who may desire to send. The power which establishes and controls this mail should not permit it to be superceded by individual combinations, by the establishment of regular expresses between important points, for the conveyance of mail matter with or without charge . . .

As the United States mail advances as rapidly as the ordinary channels of conveyance and the condition of the roads will allow, it will diffuse in its progress and on its arrival the same intelligence to all. Not so private express. Besides, these private expresses may be the means of conveying false intelligence, operating equal injury upon the commercial interest.

*Id.*; see also H.R. Rep. No. 477, *supra* n.33, at 1: "Through no other agency can the stated means of transmitting intelligence be maintained co-extensively with the population and settlement of the country."

See also Scheele, *supra* n.26, at 64-65.

<sup>37</sup> As stated in the House Report:

To content the man dwelling remote from towns with his lonely lot, by giving him regular and frequent means of intercommunications; to assure the emigrant who plants his new home over the skirts of the distant wilderness, or prairie, that he is not forever severed from the kindred and society that still share his interest and love; to prevent those whom the swelling tide of population is constantly pressing to the outer verge of civilization from being surrendered to surrounding influences, and sinking into the hunter or savage state; to render the citizen, how far soever from the seat of his Government, worthy, by proper knowledge and intelligence, of his important privileges as a sovereign constituent of the Government; to diffuse, throughout all parts of the land, enlightenment, social improvement, and national affinities, elevating our people in the scale of civilization, and binding them together in patriotic affection; — these are con-

not an end in themselves, but the means to achieve national integration.<sup>38</sup>

The government's purported need to manage the flow of information is constitutionally suspect; was immediately mooted by the invention of the telegraph;<sup>39</sup> and, in any event, was never one that even "arguably" inured to the benefit of

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siderations which the advocates of the right of individual enterprise to the conveyance of the mails disregard.

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The business of conveying letters being a governmental function, it must, in the nature of things, be exclusive. Having to perform this duty on routes where the distances are long and the letters few, as well as where the distances are short and the letters many; and being required to do this at rates uniform according to distance, whether the letters are few or many, — it follows that, if individuals are permitted to engage in the business, by confining their operations to the routes on which they incur but small expense and transact large business, they can perform the service on such routes at a less charge than the Government, and will necessarily in time, deprive it all the business arising within the sphere of competition.

H.R. Rep. No. 477, *supra* n.33, at 2-3.

It is interesting to note that there was no nationally uniform postal rate at the time, nor was one being considered, hence the allusion to "rates uniform according to distance." The concern of the Committee was not that the Post Office would lose its profitable routes, but that it would be driven out of business entirely, i.e., lose "all the business arising within the sphere of competition."

<sup>38</sup> There was, of course, substantial debate on *how* best to rid the Post Office of competition from private expresses. Sen. Merrick, a proponent of the bill, urged lowering postal rates and increasing penal prohibitions, 14 Cong. Globe, *supra* n.35, at 206. Sen. Dana suggested lowering postal rates and increasing competition, *id.* at 348. This debate involved the means and not the ends of the legislation.

<sup>39</sup> See Fuller, *supra* n.30, at 172-173.

postal employees. The goal of protecting the rights of those on the frontier to obtain mail service as part of a "national compact,"<sup>40</sup> and subsidizing expansion of postal service to the frontier might "arguably" bring postal patrons from remote areas deprived of mail services within the PES's zone of interest, but lends no support whatever for the Unions' standing.

### 3. Exceptions to the Restrictions on Private Carriage Demonstrate Postal Employees' Lack of Interest in Revenue Protection

The suggestion that job opportunities and job security for postal employees are included in the goal of revenue protection for nation-building is dispelled by two provisions, one enacted in 1845, the other in 1852, that remain in the PES today. Section 11 of the 1845 Act provided that

nothing in this act . . . shall be construed to prohibit the conveyance of letters . . . to any part of the United States, by private hands, no compensation being tendered or received therefor in any way, or by special messenger employed only for the single particular occasion.<sup>41</sup>

This exception, originally in § 14 of the 1792 Act, is now codified at 18 U.S.C. § 1696(c).<sup>42</sup>

In 1852 Congress created a further exception to the restrictions on private carriage of letters that demonstrates Congress' lack of intent to benefit for postal employees. Section 8 of the 1852 Act provided in part:

All letters enclosed in [stamped] envelopes as shall be provided by the Postmaster General, ...

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<sup>40</sup> H.R. Rep. No. 477, *supra* n.33, at 1.

<sup>41</sup> Statute II, Chapter XLIII, § 11, Vol. 2 U.S. Statutes at Large 1835-1845, at 736.

<sup>42</sup> See p.3, *supra*.

(and the such postage on such envelopes being equal in value and amount to the rates of postage to which such letters would be liable, if the same were sent by mail, ...) may be sent, conveyed, and delivered otherwise than by post or mail....<sup>43</sup>

This exception is now codified at 39 U.S.C. § 601(a)(2). See page 3, *supra*.

These two exceptions demonstrate that Congress did not intend to make work for postal employees. Under § 11 of the 1845 Act, if a "competitor" was willing to provide the service for free, Congress' nation-building objectives would be met and Congress was willing to forego both the revenues and the work

<sup>43</sup> 10 Statutes at Large, 32d Cong., 1st Sess., 140-141 (1852). The following amendments are recodifications which occurred after 1852:

The Act of March 25, 1864, ch. 40, § 7, 13 Stat. 37, enacted the suspension provision now in § 601(b).

Statutes at Large, Title XLVI CA. 335, 42d Cong., 2d Sess. (1872).

In 1874, all the statutes of the United States were revised and codified into the Revised Statutes. Section 228 of the 1872 Act (now § 1696(a)) became § 3982 of the Revised Statutes. Similarly, § 230 became R.S. § 3984; and § 238 became R.S. § 3992. See Revised Statutes §§ 3982, 3984, 3992, 20 Stat. 775-76 (1874).

The Act of March 3, 1879, ch. 180, § 1, 20 Stat. 356, amended what is now § 1696(a) to make clear that private delivery to the nearest Post Office was not forbidden.

On March 4, 1909, Congress codified the criminal laws. Prohibitions against private expresses were moved from the postal code to the criminal code. See Criminal Code of 1909, ch. 321, §§ 181, 183, 186, 35 Stat. 1124-25. See also Special Joint Comm. on the Revision of the Laws "Revision and Codification of Law Etc.," S. Rep. No. 10, 60th Cong., 1st Sess., pt. 1 (1909).

The Act of June 22, 1934, ch. 716, 48 Stat. 1207, amended what is now § 1696(c) to limit the "special messenger" exemption to carriage of 25 or fewer letters. The amendment was aimed against public utilities delivering their own bills. Even in the depth of the Great Depression there was no mention

for postal employees. Under § 8 of the 1852 Act, if a customer was willing to pay postage *and* a private courier, Congress was happy to accept the revenue without providing the service and again forego the employment opportunity for the postal employee.

In sum, the history of the PES demonstrates that the court of appeals below erred by focussing exclusively on the 1792 Act; on the revenue protective *means* rather than Congress' nation-building and "intelligence" control *ends* originally served by the PES, and on an unwarranted job protection "gloss" on revenue protection. As stated by the court of appeals for the Sixth Circuit:

It cannot seriously be contended that the Private Express Statute was enacted for the protection of a class which included the postal employees or a union representing them.

*American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal System of America, Inc.*, 481 F.2d 90, 93 (6th Cir. 1973), *cert. dismissed*, 415 U.S. 901 (1974).<sup>44</sup>

of any interest of postal employees. See 78 Cong. Rec. 7376, 8230, 8783-34 (1934); H.R. Rep. No. 1328, 73d Cong., 2d Sess. 1-2 (1934); H.R. Rep. No. 1613, 74th Cong., 1st Sess. 1-2 (1935).

The Act of June 29, 1938, ch. 805, 52 Stat. 1231, amended what is now § 601(a) to permit private carriage of metered mail. See 83 Cong. Rec. 9665.

Section 1696 of 18 U.S.C., ch. 645, 62 Stat. 777, enacted the criminal code of 1948 into title 18 of the U.S. Code. Sections 181, 183 and 186 of the 1909 code were gathered into a single section.

<sup>44</sup> But see *National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America, Inc.*, 470 F.2d 265 (6th Cir. 1972); *American Postal Workers Union v. React Postal Services, Inc.*, 771 F.2d 1375 (10th Cir. 1985).

C. The 1970 Postal Reorganization Act Does Not Bring the Unions Within the Zone of Interest of the Private Express Statutes

The court of appeals erred in looking beyond the PES to the PRA to determinate the zone of interest of the PES, because it is the PES "whose violation forms the legal basis for [the Unions'] complaint." *Lujan, supra*, 58 U.S.L.W. at 5080. If the PRA has any relevance to the zone of interest of the PES, it tends to confirm that postal employees were never the intended beneficiaries of restrictions on private carriage. The PRA reflects a congressional intent to *reduce* the influence of postal employees in the conduct of the Postal Service's *business*.

1. The Private Express Statutes and the Postal Reorganization Act Lack a Single Unified Purpose

The court of appeals erred in considering the PRA "relevant" to the zone of interest of the PES, because the two statutes do not have a "single unified purpose" as required by *Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150, 155 (1970). The purposes of the PES and the PRA are multiple, divergent and, indeed, contradictory.

The objective of the PES was to foster national economic and political integration and to control the flow of intelligence, while the objectives of the PRA were to reduce labor costs, increase automation, and create a more efficient, businesslike postal service organization.<sup>45</sup> Rather than sharing a single unified purpose, the PES and the PRA are at cross-purposes: the PES's goal of monopoly, particularly government monopoly, is

<sup>45</sup> See *Report of House Committee on Post Office and Civil Service on the Postal Reorganization and Salary Adjustment Act of 1970*, H.R. Rep. No. 1104, 91st Cong., 2d Sess. 1-2 (1970); *Peoples Gas, Light & Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1196 (7th Cir. 1981) ("Only the consumer interest is arguably within the zone of interest protected by the [Postal Reorganization] Act").

recognized as inefficient;<sup>46</sup> whereas the PRA's goal was to promote efficiency by making the Postal Service more like a private, competitive enterprise and allow the market to determine postal services.<sup>47</sup>

In sum, the PRA had the modern purpose of efficiency, while the PES sought to build the nation by the now outmoded means of a government monopoly.

There are other provisions of the PRA that manifest a sharp diversity with the goals of the PES. Section 7 of the PRA called on the Board of Governors of Postal Service to reconsider the PES in light of technological developments.<sup>48</sup> Thus, § 7 demonstrates Congress' recognition of the divergence of the PES and PRA's purposes.<sup>49</sup> In addition, the PRA ended the

<sup>46</sup> Department of Justice Comments, Jt. App. at 22. Adie, *Why Marginal Reform of U.S. Postal Service Won't Succeed*, *Free the Mail* 85 (1990).

<sup>47</sup> Fuller, *supra* n.30, at 332-333.

<sup>48</sup> Section 7 provides:

The Congress finds that advances in communications technology, data processing, and the needs of mail users require a complete study and thorough reevaluation of the restrictions on private carriage of letters and packets contained in chapter 6 of title 39, 1694-1696 of title 18, United States Code, and the regulations established and administered under these laws. The Board of Governors of the United States Postal Service shall submit to the President and the Congress within 2 years after the effective date of this section a report and recommendation for the modernization of these provisions of law, and such regulations and administrative practices.

Pub. Law 91-375, 84 Stat. 783 (August 12, 1970).

<sup>49</sup> On June 29 1973, the Board of Governors issued a "deliberately brief" 14 page report entitled "The Private Express Statutes and Their Administration," that recommended leaving the PES alone. See Lib.Cong. KF 2665 .A39, cited by the court of appeals as Board of Governors, *Statutes Restricting Private Carriage of Mail and Their Administration*, 93d Cong., 1st Sess. 5 (Comm. Print 1973). The court of appeals mistakenly imputed the Board's satisfaction with the PES to Congress and erroneously concluded that the

policy of rate cross-subsidies among classes of service, long a cornerstone of the PES. As a general matter, Congress declared that "[p]ostal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." 39 U.S.C. § 101(d) (1970). More specifically, Congress created the Postal Rate Commission to oversee ratemaking, 39 U.S.C. Ch. 36, and required that "... each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type. . ." 39 U.S.C. § 3622 (1970).

The court of appeals held that an "interplay" between the PES and PRA, short of an identity of purpose, establishes an "arguable or plausible relationship between the purposes of the PES and interests of the Union." Pet. App. at 8a-9a (internal punctuation omitted). The court did not define what it considered an "interplay." The principles of standing in general and the zone of interest test in particular are confusing enough, and have been severely criticized for that reason by courts<sup>50</sup> and commentators<sup>51</sup> alike, that they do not need the further ambiguity that the court of appeals' vague new "interplay" standard creates.

PES "play a pivotal role in achieving an important purpose of the PRA..." Pet.App. at 8a. Note also that the report is absolutely silent as to postal employees, let alone any interest they might have in the PES.

<sup>50</sup> *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 736 F. Supp. 267, 273 (N.D. Ga. 1990) ("Supreme Court precedent in this area is confusing").

<sup>51</sup> See e.g., *Fletcher*, *supra* n.18, at 221 ("the structure of standing law in the federal courts has long been criticized as incoherent").

## 2. The PRA's Elimination of Civil Service Protection and Enactment of Other Postal Reforms Opposed by the Unions Precludes Its Use to Evidence Congress' Intent to Establish Employment Security as a Purpose of the PES

The Unions *opposed* postal reorganization, because (1) it would eliminate the job security their members enjoyed under Civil Service, *see* Rademacher testimony, *supra* n.7, at 745; (2) automation, labor cost reduction and contracting out provisions would reduce employment opportunities, *id.* at 739-740; (3) it would eliminate cross-subsidies in rate-making, *id.* at 743; (4) it contained a right to work provision, *see id.* at 756;<sup>52</sup> and (5) it included the labor-management reforms (upon which the court of appeals relied heavily to find an "interplay" between the PRA and the PES). Mostly the Unions objected to the PRA because it would cut off postal employees from their congressional benefactors. *Id.* at 746. Generally, the statements of union *opposition* to postal reorganization were strikingly similar to those historically used to justify the restrictions on private carriage.<sup>53</sup> Congressional passage of the PRA over these objections, if anything, demonstrates PRA was a step back from the PES. The PRA is a particularly inapt vehicle for backing postal employees into the PES's zone of interest in which Congress had not seen fit to include them during the preceding 200 years.

<sup>52</sup> See also *Hearing of the House Committee on Post Office and Civil Service*, 91st Cong., 1st Sess. 1054 (testimony of George Meany, President, AFL-CIO).

<sup>53</sup> See Meany Testimony, *supra* n.52, at 1049-1050.

## II.

THE COURT OF APPEALS ERRED IN FINDING  
THE UNIONS IN THE ZONE OF INTEREST OF THE  
PES WHETHER APA § 702 OR PRA § 409 IS  
THE PROPER JURISDICTIONAL BASIS FOR  
THE UNIONS' COMPLAINT

The Unions' complaint invoked § 409 of the PRA as the jurisdictional basis for challenging under the PES the Postal Service promulgation of the Remail Rule. Jt. App. at 108. The district court below applied the zone of interest test under the mistaken assumption that the Unions had brought suit under § 702 of the Administrative Procedures Act, 5 U.S.C. § 702. Pet. App. at 34a. The court, however, noted that the zone of interest test applied whether a suit challenged agency action or not. *Id.* at 33a n. 3, citing *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 144-45 (D.C. Cir. 1977), *Data Processing, supra*, and *Clarke, supra*.

The court of appeals, on the other hand, recognized that "[t]he district courts have original jurisdiction over suits against the Postal Service," citing 39 U.S.C. § 409 (1982). Pet. App. at 4.a. The court went on to cite the Postal Service's exemption from the APA pursuant to 39 U.S.C. § 410(a), but concluded that "the APA provides the appropriate standards for evaluating the procedural and substantive issues in this case," because the Postal Service "has chosen to follow the APA when promulgating rules affecting the PES," citing 39 CFR § 310.7(1988). *Id.* Later in its opinion, however, the court of appeals stated that "[t]he Union's cause of action derives from § 702 of the APA. . ." *Id.* at 6a.

As the district court correctly noted, the zone of interest test has been applied in both APA and non-APA cases. This Court has stated that its invocation of the zone of interest in non-APA cases "should not be taken to mean that the standing

inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the 'generous review provisions' of the A.P.A. apply." *Clarke*, 479 U.S. at 400 n.16. The *Clark* footnote suggests that standing requirements in non-APA cases may require the plaintiff to satisfy the zone of interest test plus something more, unless the "generous review provisions of the APA apply." The court of appeals did of course apply the APA's generous review provisions based on the Postal Service's stated intent to abide by the APA's "rulemaking provisions."

The court of appeals erred in its determination that the Unions were within the zone of interest of the PES, whether or not the court of appeals was correct in applying the generous review provisions of § 702. There is nothing in § 409 to suggest that it is even more "generous" than § 702. Therefore, inasmuch as the Unions have failed to satisfy the zone of interest test, they *a fortiori* cannot meet any alternative standing test under § 409 that would require them to satisfy the zone of interest test and something more, regardless of what that additional burden might be.

## III.

THE POSTAL SERVICE'S PROMULGATION OF THE  
INTERNATIONAL REMAIL RULE WAS NOT  
UNREASONABLE, ARBITRARY OR CAPRICIOUS

While the court of appeals correctly recognized that it "may not impose its own rigid interpretation of the 'public interest,'" Pet. App. 15a, it did just that in the guise of statutory construction where none was called for. The court erred by rewriting the public interest standard of § 601(b) to include a requirement that the Postal Service "give sufficient attention to how revenue losses might affect cost and service of other postal patrons." Pet. App. 14a.

A. Absent a Legal Issue as to the Meaning of the  
Public Interest Requirement the Court of Appeals  
Should Have Deferred to the Postal Service's  
Interpretation

Neither the Postal Service's interpretation of the PES as extending to international mail nor its authority to suspend the PES were at issue before the court of appeals or are at issue here.<sup>54</sup> What the Unions originally challenged and what is at issue before this Court is the manner in which the Postal Service exercised that suspension authority under § 601(b)'s public interest standard. The court of appeals did not disturb the district court's rejection, Pet. App. 35a, of the Unions' request that the statute's "where the public interest requires" language be construed as imposing a "heightened standard." See Pet. App. 12a. There was therefore no need for the court of appeals to delve into the legislative history of the PES to resolve "specific issues

<sup>54</sup> Nevertheless, ACCA questions the Postal Service's interpretation of the PES as extending to international mail and its administrative definition of "letters." ACCA also questions whether the Postal Service, as an interested competitor can properly administer the regulatory scheme created by the PES. Cf. *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Word v. Village of Monroeville*, 409 U.S. 57 (1972).

of law raised in the proceeding under review." Pet. App. 13a (quoting *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1496-97 (D.C. Cir. 1988). Absent a legal issue as to the meaning of the public interest standard, the Postal Service's interpretation is entitled to deference and the analysis set forth in *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984), is inapplicable. Inasmuch as there is no dispute, "the intent of Congress is clear [and] that is the end of the matter." *Chevron*, 467 U.S. at 842-843.

Second, the court of appeals misconstrued the requirements of *Chevron*. If there were any legal issues concerning the public interest standard that would require further inquiry, *Chevron* dictates that where there is no "unambiguously expressed intent of Congress," *id.* at 843, the court of appeals should not substitute its own construction for the public interest standard for that of the Postal Service. *Id.* at 844; see also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 1220-22, 1224-25 (1987). The court of appeals identified no unambiguous intent of Congress to require the consideration of the effect of a suspension of the PES on the cost and service to all postal patrons.<sup>55</sup> Accordingly, the Postal Service's interpretation of the public interest standard as being satisfied by the existence of general benefits to the public, competition, international competitiveness, and users of remail must be given deference.

Third, having unnecessarily tapped the legislative history of the PES, the court of appeals then used its erroneous reading of that legislative history to substitute its own judgment of what the public interest analysis should have entailed. After separa-

<sup>55</sup> Congress itself never engaged in the wide ranging inquiry in enacting any exception to the PES that the court of appeals would not require of the Postal Service. Congress, as best as can be determined, arrived at a general conclusion that the exceptions were in the public interest. That of course is exactly what the Postal Service did in issuing the international remail rule.

tion of the Post Office from the Treasury in the early 1820's, revenues *per se* were never a goal of the PES. If they were, the Postal Service could have justified virtually any intrusion into the unregulated private sector in the name of increased revenues. Later, revenues were a means to an end that has been by and large accomplished.

Still, the Postal Service did consider its own worst case scenario as to loss of revenues and determined that the total potential loss of revenue (not net revenue) of \$ 882 million in 1985 would not be "so adverse as to outweigh allowing remailing to continue." 51 Fed. Reg. at 21, 931 (June 17, 1986). The Postal Service's judgment was never challenged by those arguably intended to benefit by those revenues, the "frontier" mail user. Of course, given the Justice Department's doubts as to the application of the PES to international mail it is questionable whether any adverse impact of the loss of international mail revenues would even be relevant to the purposes of the PES.

**B. The Administrative Record Supports the International Remail Rule As Consistent With the Purposes of the PES Even Under the Court of Appeals' Reading of the Public Interest Standard**

The administrative record contains the International Remail Committee's detailed analysis of the effects of the remail rule on the various classes of Postal Service. The International Remail Committee's comments in opposition to the first proposed anti-Remail Rule offered a detailed analysis of the effects on net Postal Service revenues, on remail of international printed matter, on remail of first matter, on Express Mail and on inbound remail. Admin. Rec. 32, at 38-43. That analysis, which concluded that the rule would have no adverse effect, was not rebutted. The Remail Committee compared the effects of remail to the board of Governors' own analysis of the purposes of the PES and found them to be consistent.

In addition, the Remail Committee on December 23, 1985 submitted additional comments explaining certain "myths" about remail and summarizing the public comments of others. The general counsel of the Postal Service on January 7, 1986 wrote to counsel for the Committee indicating that the Postal Service

very much appreciate[s] the careful exposition of [The Committee's] views on this subject and the summary of comments which members of the public have submitted. We will certainly be taking your views and those of your clients into account as we consider the action to be taken on our proposal.

Admin. Rec. 71.

The Postal Service in its statement issuing the rule stated that it considered all submissions. Accordingly, the Postal Service actually made the very analysis the court of appeals held it should have made and reached a rational decision that remail did not violate the purposes of the PES. In short, the Postal Service considered the factors suggested by the court of appeals and determined that remail furthered, rather than defeated the purposes of Congress.

**C. Achievement of the PES's Purposes Requires Greater Deference to the Congress' Subsequent Enactments**

The piecemeal enactment of the PES between the late 1700's and mid-1800's to control the flow of information and to build the nation by helping to finance expansion of postal service to the frontier leaves anachronistic relics on the statute books today. Both goals have been accomplished or mooted by subsequent technology and national economic and political integration.<sup>56</sup> To the extent that the revenue protective

<sup>56</sup> See Fuller, *supra* n.30, at 332-333 (nation-building goals of the PES were accomplished by World War I).

measures of the PES designed to complement the original nation-building goal retain any independent viability now that that goal has been achieved, such measures must be constrained by later congressional pronouncements. *See generally, Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).<sup>57</sup>

Two statutes are relevant. The Sherman Act, 15 U.S.C. §§ 1 *et seq.*, whose centennial was celebrated just this month<sup>58</sup> and which constitutes the "Magna Carta of free enterprise,"<sup>59</sup> and the PRA. The law now favors competition over monopoly. Indeed, Congress in the 1970 PRA called on the Postal Service to reconsider and make recommendations on amending the laws limiting the private carriage of letters.<sup>60</sup> The Justice Department, of course, enforces both the antitrust laws and the criminal provisions of the PES. As such, it is both a partner of the Postal Service in the administration of the PES — whose interpretation of the PES is entitled to particular deference — and particularly well qualified to resolve the conflicts between the outmoded PES and the pro-competitive policies of the later-enacted Sherman Act. The Justice Department resolved the conflict in favor of the remail rule. It also reviewed the record and found it to support the rule.

Accordingly, the burden of persuasion was on those opposing the Remail Rule to establish that some underlying purpose

<sup>57</sup> We do not suggest that the antitrust laws repealed the PES. But given the accomplishment of the PES's goals, its prohibitions should be construed narrowly and interpreted to the greatest extent possible consistently with the antitrust laws.

<sup>58</sup> 58 ATRR 999 (June 28, 1990).

<sup>59</sup> *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (Marshall, J.).

<sup>60</sup> The Board of Governors' token report electing to leave the laws alone bespeaks the institutional inertia that clings to old ways well after their *raison d'être* has ceased to exist. In any event the report represents the Board's and not Congress' views. *See note 49, supra.*

of the PES would be defeated by the rule. Indeed, rather than having the Postal Service justify a more limited remail rule, it was up to the opponents to show why the remail rule went too far. *See Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (anticompetitive restrictions limited to extent necessary to make regulatory scheme work).

Neither the Unions nor any other commentators opposing the rule submitted any factual argument suggesting that the suspension would defeat any congressional purpose of the PES. Predictably, not a single representative of any remote area opposed the rule. The Unions also failed to argue that such service would be affected. Moreover, the Remail Rule has been in effect for nearly four years. During that time no postal patron has sought any Postal Rate Commission investigation pursuant to 39 U.S.C. § 3662 on grounds that it has been deprived of service or that rates it is charged are too high as a result of the Remail Rule.

In sum, the Postal Service was not unreasonable, arbitrary or capricious in promulgating the Remail Rule and the court of appeals erred in so holding.

**CONCLUSION**

For the reasons set forth petitioner ACCA respectfully requests the Court to reverse the court of appeals' order, reinstate the judgment of the district court and award costs against respondent Unions.

Respectfully submitted,

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Dated: July 27, 1990

## **APPENIDIX**

**TWENTY-EIGHTH CONGRESS. SESS. II CH. 43 1845.**

**Sec. 9.** *And be it further enacted,* That it shall not be lawful for any person or persons to establish any private express or expresses for conveyance, nor in any manner to cause to be conveyed, or provide for the conveyance, or transportation by regular trips, or at stated periods or intervals, from one city, or other place, to any other city, town, or place in the UNITED STATES, between and from and to which cities, towns, or other places the United States mail is regularly transported, under the authority of the Post Office Department of any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals; and each and every person offending against this provision, or aiding and assisting therein, or aiding such private express, shall, for each time any letters, packet or packages or other matter properly transmittable by mail, except newspapers, pamphlets, magazines, periodicals, shall or may be, by him or them, or through his her or their means or instrumentality, in whole or in part, conveyed or transported, contrary to the true intent, spirit, and meaning of this section, forfeit and pay the sum of one hundred and fifty dollars.

**SEC. 10.** *And be it further enacted,* That it shall not be lawful for any stage-coach, railroad car, steamboat, packet boat, or other vehicle or vessel, nor any of the owners, managers, servants, or crews of either, which regularly performs trips at stated periods on a post route, or between two or more cities, towns, or other places, from one to the other of which the United States mail is regularly conveyed under the authority of the Post Office Department, to transport or convey, otherwise than in the mail, any letter or letters, packet or packages of letter or otherailable matter whatsoever, except such as may have relation to some part of the cargo of such steamboat, packet boat, or other vessel, or to some article at the same time conveyed by the same stage coach, railroad car, or other vehicle, and excepting also,

newspaper, pamphlets, magazines, and periodicals; and for every such offence, the owner or owners of the stage-coach, railroad car, steamboat, packet boat, or other vessel, shall forfeit and pay the sum of one hundred dollars; and the driver, captain, conductor, or person having charge of any such stage-coach, railroad car, steamboat, packet boat, or other vehicle or vessel, at the time of the commission of any such offence, and who shall not at that time be the owner thereof, in whole nor in part, shall in like manner, forfeit and pay, in every such case of offence, the sum of fifty dollars.

SEC. 11. *And be it further enacted*, that the owner or owners of every stage-coach, railroad car, steamboat, or other vehicle or vessel, which shall, with the knowledge of any owner or owners, in whole or in part, or with the knowledge or connivance of the driver, conductor, captain, or other person having charge of any such stage-coach, railroad car, steamboat, or other vessel or vehicle, convey or transport any person or persons acting or employed as a private express for the conveyance of letters, packets, or packages of letters, or otherailable matter, and actually in possession of suchailable matter, for the purpose of transportation, contrary to the spirit, true intent, and meaning of the preceding sections of this law, shall be subject to the like fines and penalties as are hereinbefore provided and directed in the case of persons acting as such private expresses, and of persons employing the same; but nothing in this act contained shall be construed to prohibit the conveyance or transmission of letters, packets, or packages, or other matter, to any part of the United States, by private hands, no compensation being tendered or received therefor in any way, or by a special messenger employed only for the single particular occasion.

SEC. 12. *And be it further enacted*, That all persons whatsoever who shall, after the passage of this act, transmit by any private express, or other means by this act declared to be unlawful, any letter or letters, package or packages, or otherailable matter, excepting newspapers, pamphlets, magazines and periodicals, or who shall place or cause to be deposited at any appointed place, for the purpose of being transported by such unlawful means, any matter or thing properly transmittable, by mail, excepting newspapers, pamphlets, magazines and periodicals, or who shall deliver any such matter, excepting newspapers, pamphlets, magazines and periodicals for transmission to any agent or agents of such unlawful expresses, shall, for each and every offence, forfeit and pay the sum of fifty dollars.

SEC. 13. *And be it further enacted*, That nothing in this act contained shall have the effect, or be construed to prohibit the conveyance or transportation of letter, by steamboats, as authorized by the sixth section of the act entitled 'An act to reduce into one the several acts for establishing and regulating the Post Office Department, approved the third of March, one thousand eight hundred and twenty-five:" *Provided*, That the requirements of said sixth section of said act be strictly complied with, by the delivery, within the time specified by said act, of all letters so conveyed, not relating to the cargo, or some part thereof, to the postmaster or other authorized agent of the Post Office Department at the port or place to which said letters may be directed, or intended to be delivered over from said boat; and the postmaster or other agent of the Post Office Department shall charge and collect upon all letters or otherailable matter, so delivered to him, except newspapers, pamphlets, magazines, and periodicals, the same rates of postage as would have been charged upon said letters had they been transmitted by mail from the port or place at which they were placed on board the steamboat from which they were received; but it is hereby expressly provided, that all the pains and penalties provided by this act, for any violation of the provisions of the eleventh

4-a

section of this act, shall attach in every case to any steamboat, or to the owners and persons having charge thereof, the captain or other person having charge of which shall not, as aforesaid, comply with the requirements of the sixth section of the said law of one thousand eight hundred and twenty-five. And no postmaster shall receive, to be conveyed by the mail, any packet which shall weigh more than three pounds.

JUL 27 1990

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1990

**AIR COURIER CONFERENCE OF AMERICA, PETITIONER**

**V.**

**AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.**

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE  
UNITED STATES POSTAL SERVICE  
AS RESPONDENT SUPPORTING PETITIONER**

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### QUESTIONS PRESENTED

1. Whether employees of the United States Postal Service, through their unions, can bring suit under the Administrative Procedure Act to challenge a Postal Service regulation permitting private mail services to engage in international remailing.

2. Whether the Postal Service acted arbitrarily and capriciously in promulgating its international remailing regulation.

## II

### PARTIES TO THE PROCEEDINGS

The petitioner is the Air Courier Conference of America, a trade association with approximately 150 members. Respondents are the American Postal Workers Union, AFL-CIO, the National Association of Letter Carriers, AFL-CIO, and—pursuant to Sup. Ct. R. 12.4—the United States Postal Service.

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## In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1416

AIR COURIER CONFERENCE OF AMERICA, PETITIONER

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS—  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE  
UNITED STATES POSTAL SERVICE  
AS RESPONDENT SUPPORTING PETITIONER

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 891 F.2d 304. The opinion of the district court (Pet. App. 28a-38a) is reported at 701 F. Supp. 880.

## JURISDICTION

The judgment of the court of appeals was entered on December 8, 1989. The petition for a writ of certiorari was filed on March 8, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

STATUTORY AND REGULATORY  
PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in an appendix to this brief.

## STATEMENT

1. Since the days of the Articles of Confederation, the United States Postal Service has exercised a monopoly over the carriage of letters in and from the United States. The postal monopoly is codified in a group of statutes known as the Private Express Statutes (PES), 18 U.S.C. 1693-1699 and 39 U.S.C. 601-606, which generally prohibit the establishment of any private express for the conveyance of letters or packets of letters over postal routes. Congress created the monopoly as a revenue protection measure for the Postal Service. It prevents private competitors from offering service on low-cost routes at prices below those of the Postal Service, while leaving the Service with high-cost routes and insufficient means to fulfill its mandate of providing uniform rates and "prompt, reliable, and efficient services to patrons in all areas," including remote or less populated areas. *Regents of the University of California v. Public Employment Relations Board*, 108 S. Ct. 1404, 1408 (1988) (quoting 39 U.S.C. 101(a)). See also J. Haldi, *Postal Monopoly: An Assessment of the Private Express Statutes* 9 (1974); Craig & Alvis, *The Postal Monopoly: Two Hundred Years of Covering Commercial as Well as Personal Messages*, 12 U.S.F. L. Rev. 57, 60 & n.8 (1977) (discussing legislative history). The dispute in this case involves a provision of the PES that authorizes the Postal Service to "suspend [the Private Express restrictions] upon any mail route where the public interest requires the suspension." 39 U.S.C. 601(b).

In 1979 the Postal Service suspended the PES restrictions for "extremely urgent letters," thereby allowing overnight delivery of letters by private courier services. 39 C.F.R. 320.6 (1989); 44 Fed. Reg. 61,178 (1979).<sup>1</sup>

<sup>1</sup> The suspension was enacted in response to congressional concern that the Postal Service was not adequately serving the needs of businesses with time-sensitive materials. See *Private Express Statutes: Hearings Before the Subcomm. on Postal Operations and Services of the House Comm. on the Post Office and Civil Service*, 96th Cong., 1st Sess. 21-22 (statements of Chairman

Private courier services relied on that suspension to engage in a practice called "international remailing," in which private courier services deposit with foreign postal administrations letters destined for foreign addresses, thereby bypassing the Postal Service entirely. Believing that international remailing was a misuse of the urgent letter suspension, the Postal Service issued a proposed modification and clarification of its regulation in order to make clear that the suspension for extremely urgent letters did not cover this practice. 50 Fed. Reg. 41,462 (1985).

The comments received in response to the proposed rule were overwhelmingly negative. Of more than 80 comments received from the public all but two, see 2 C.A. App. 101, 107, opposed the proposed rule. 2 *id.* at 102-106, 108-456. See also 51 Fed. Reg. 29,636 (1986). Most of the opposition focused on the perceived benefits of international remailing, including lower cost, faster delivery, greater reliability and responsiveness, and the enhanced ability of United States companies to remain competitive in the international market. 2 C.A. App. 102-106, 108-456. Various sources in the Executive and Legislative Branches also provided comments, citing the benefits inherent in competition from the remailing industry and the increased competitiveness of United States firms abroad. 2 *id.* at 111, 113, 420, 428, 433-456, 473-478, 527; Hawley Decl. para. 7, J.A. 120. Neither of the respondent unions<sup>2</sup> submitted comments in response to the proposed rule.

Because of the vigorous opposition to the proposed rule, the Postal Service agreed to reconsider its position and

Wilson), 333-334 (statements of Postmaster General Bolger) (1979). Also excepted from the PES are letters of student and faculty organizations, 39 C.F.R. 320.4, letters accompanying cargo, 39 U.S.C. 602(a)(2); 39 C.F.R. 310.3(a), letters carried by special messenger, 18 U.S.C. 1696(c); 39 C.F.R. 310.3(d), and letters carried to a post office, 18 U.S.C. 1696(a); 39 C.F.R. 310.3(e).

<sup>2</sup> Although the Postal Service is also a respondent in this case pursuant to Sup. Ct. R. 12.4, we will use the term "respondent" only in connection with the respondent unions.

instituted a rulemaking "to remove the cloud" over the validity of the international remailing services. 51 Fed. Reg. 9852, 9853 (1986).<sup>3</sup> Following this notice, 12 comments were received, 2 C.A. App. 470-534, only one of which opposed the practice of international remailing, 2 *id.* at 485. The comments again focused on the lower costs, greater speed, and better service that remailers were thought to provide. 2 *id.* at 470-484, 486-534. To supplement the record further, to gain additional insight into the practice of international remailing, and to receive suggestions regarding the form that a suspension might take, the Postal Service gave notice of, 51 Fed. Reg. 17,366 (1986), and subsequently held a public meeting on May 22, 1986. 2 C.A. App. 541-603 (transcript). See Hawley Decl. para. 10, J.A. 121.

One month later, on June 17, 1986, the Postal Service issued a proposal, accompanied by a statement of reasons, to suspend operation of the PES for international remailing. 51 Fed. Reg. 21,929-21,932 (1986). Nine comments were received in response to the proposed rule, 2 C.A. App. 633-677, only one of which, from the respondents, opposed it, J.A. 85-96. 51 Fed. Reg. 29,636 (1986). Although the comments concerning the economics of international remailing were not as responsive, precise, and detailed as the Postal Service had hoped, the Service nevertheless concluded that it had "compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension." 51 Fed. Reg. at 29,637; Pet. App. 23a. Accordingly, the Postal Service issued a final rule suspending the operation of the PES in relation to international remailing services.

2. Two postal worker unions brought this action in district court, challenging the international remailing regulation on the ground that the rulemaking record was inadequate to support a finding that the suspension of the

<sup>3</sup> In addition to the public notice, each person who had submitted comments in response to the original notice of proposed rulemaking was sent a letter soliciting information regarding remailing. 51 Fed. Reg. at 9852.

PES for international remailing was in "the public interest." The unions alleged that their claims arose under the Private Express Statutes and regulations, the Declaratory Judgment Act, 28 U.S.C. 2201, and the Mandamus Act, 28 U.S.C. 1361. Compl. 1 (dated Nov. 16, 1987); J.A. 107. They did not allege that their claims arose under the Administrative Procedure Act (APA), 5 U.S.C. 701-706. See J.A. 107.

The district court dismissed the unions' complaint on two grounds. The court first held that while the postal workers' interest in job security was sufficient to establish Article III standing, the unions did not satisfy prudential standing limitations. Specifically, the court held that the unions' interest in preserving employment opportunities with the Postal Service did not fall within the "zone of interests" protected by the Private Express Statutes. Pet. App. 30a-34a. Second, the district court held that even if the unions' complaint were considered on the merits, the Postal Service's decision was not arbitrary and capricious, and was based on an adequate rulemaking record. *Id.* at 34a-38a.

3. The court of appeals reversed. Pet. App. 1a-18a. It held that the unions satisfied the zone of interests requirement for APA review under *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), and that the Postal Service's regulation was arbitrary and capricious, because the Service relied on too narrow an interpretation of "the public interest."

On the standing question, the court noted, Pet. App. 4a, that "[a]lthough the USPS is exempt from the strictures of the Administrative Procedure Act ('APA'), see 39 U.S.C. § 410(a), it has chosen to follow APA procedures when promulgating rules affecting the PES. See 39 CFR 310.7 (1988)." The court therefore concluded that Section 702 of the APA, 5 U.S.C. 702, and the "zone of interests" test which this Court has recognized as "a gloss on § 702 of the APA," Pet. App. 6a, applied to this case.

In determining that the interest in employment opportunities was protected by the PES, the court observed

that the PES were re-enacted as part of the Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified at 39 U.S.C. 101-5605). A "key impetus" and "principal purpose" of the PRA, in turn, was "to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees." Pet. App. 8a. Reasoning that "[t]he Unions' asserted interest is embraced directly by the labor reform provisions of the PRA" and that "[t]he PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service," the court concluded that "[t]he interplay between the PES and the entire PRA persuades us that there is an 'arguable' or 'plausible' relationship between the purposes of the PES and the interests of the Union[s]." *Id.* at 8a-9a. The court also held that "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities," since "postal workers benefit from the PES's function in ensuring a sufficient revenue base" for the Postal Service's activities. *Id.* at 9a.

On the merits, the court of appeals held that the Postal Service had considered only the cost savings and service benefits to the international business sector from the suspension of the PES in favor of private international re-mailing, and had not adequately considered the effect of the regulation "on those [other] consumers who would continue to use the Postal Service, both from a price and service perspective." Pet. App. 14a. The court therefore remanded the case to the Postal Service for it to reconsider that issue. *Id.* at 16a.

## SUMMARY OF ARGUMENT

I. The unions cannot bring this action under the APA. Congress "preclude[d] judicial review" under the APA, 5 U.S.C. 701(a)(1), by enacting 39 U.S.C. 410(a), which provides that Chapters 5 and 7 of Title 5 do not apply to the Postal Service. Chapters 5 and 7 of Title 5 are the provisions of the APA dealing with "Administrative Procedure" (Chapter 5) and "Judicial Review" (Chapter 7). Although the Postal Service by regulation has chosen to follow APA rulemaking procedures, that regulation does not incorporate the judicial review provisions of the APA. Moreover, even if the APA were applicable, the unions' interest in protecting the job security of its members is not within the "zone of interests" of the PES. The PES were designed to enable the Postal Service to obtain sufficient revenue to serve the entire Nation at a uniform rate, not to protect job opportunities for postal workers. The court of appeals erred in relying on the labor reform provisions of the Postal Reorganization Act. The "relevant statute" under the APA, 5 U.S.C. 702, is the law whose violation forms the legal basis for the plaintiff's complaint. *Lujan v. National Wildlife Fed'n*, No. 89-640 (June 27, 1990), slip op. 9-10, 12. The labor reform provisions of the Postal Reorganization Act are not "relevant statute[s]," since the unions have asserted no violation of those laws.

The unions also cannot bring suit under the PES. The PES do not supply the unions with an express cause of action, and no cause of action can be implied under those laws. It is doubtful that the courts should ever imply a private right of action against the federal government. An implied right of action is generally unnecessary because the APA provides an express cause of action. In addition, if Congress has precluded review under the APA, that action signals Congress's intent that an alleged violation of federal law should not be remedied at the behest of private parties through the federal courts. In any event, nothing in the text, the purposes, or the legislative history of the PES suggests that Congress intended

those laws to grant private parties rights they could enforce in the courts. The PES were adopted for the benefit of the public, not postal employees.

Nor can the unions obtain relief under the Mandamus Act or the Declaratory Judgment Act. Mandamus is warranted only if the defendant owes the plaintiff a clear, nondiscretionary duty. That is not the case here. The Postal Service interpreted the "public interest" provision in 39 U.S.C. 601(b), which requires the Service to act in the interest of the public, not postal employees. Even if the Postal Service made the wrong decision, its action is not subject to mandamus. The Declaratory Judgment Act does not assist the unions. It authorizes a particular form of relief and does not create a cause of action.

II. The Postal Service reasonably suspended its monopoly in order to permit international remailing. The comments received from private parties and public officials overwhelmingly endorsed international remailing on the grounds that it was less expensive and more efficient than services offered by the Postal Service, and would enhance the ability of American firms to compete internationally. The Postal Service considered those comments and modified its proposal accordingly. In so doing, the Service considered the effect on its revenue from a suspension. The Service did not have as extensive or precise a factual basis as it would have liked, but the Service concluded that it had a sufficient basis to make a public interest judgment. The Service used a "worst case" scenario to estimate the total revenue loss, and concluded that the loss from international remailing was not so great as to threaten its ability to carry out its responsibilities. That judgment is entitled to deference and should be upheld.

## ARGUMENT

### I. THE UNIONS CANNOT BRING THIS SUIT TO CHALLENGE THE POSTAL SERVICE'S REGULATION SUSPENDING THE PRIVATE EXPRESS STATUTES FOR INTERNATIONAL REMAILING

The first question in this case is whether the respondent unions can bring this lawsuit to challenge the Postal Service's regulation suspending the PES for international remailing. The court of appeals held that the unions could do so under the APA. For the reasons given in Point A below, that ruling is in error. Moreover, for the reasons explained in Points B and C, the unions cannot bring this action and cannot prevail under the other statutes that the unions cited in their complaint. Their complaint should therefore be dismissed.

#### A. The Unions Cannot Bring This Suit Under The APA

##### 1. 39 U.S.C. 410(a) precludes review under the APA of the Postal Service's action

Both the parties and the courts below erroneously analyzed this case under the standards applicable to judicial review under the APA. Indeed, the court of appeals' treatment of the "zone of interests" standing question proceeded from its understanding, Pet. App. 6a, that "[t]he Unions' cause of action derives from § 702 of the APA, which grants standing to a person 'aggrieved by agency action within the meaning of the relevant statute.' 5 U.S.C. § 702 (1982)." That conclusion is wrong both as a factual and as a legal matter.<sup>4</sup>

<sup>4</sup> Although we made this point in our Brief in Opposition (at 5-7), we did not make this argument in the court of appeals. Like the respondent unions, see Plaintiffs-Appellants Br. 6 & n.6, 28, we assumed that the APA applied to this case, see Appellee Br. 18 & n.13, 20 n.16, 29-30. But since "congressional preclusion of judicial review is in effect jurisdictional," *Block v. Community Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984), the issue cannot be waived by the parties.

The unions did not in fact rely upon the APA as a basis for their claim. Rather, the complaint sought relief under the PES and their implementing regulations, under the Declaratory Judgment Act, 28 U.S.C. 2201, and under the mandamus statute, 28 U.S.C. 1361. See J.A. 107.

Moreover, the APA is not legally applicable to the unions' complaint. Section 410(a) of Title 39 specifically precludes application of the judicial review provisions of the APA to the actions of the Postal Service challenged in this case. That law states (with exceptions not pertinent here) that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, *including the provisions of chapters 5 and 7 of title 5*, shall apply to the exercise of the powers of the Postal Service" (emphasis added). Chapters 5 and 7 of Title 5 are the provisions of the APA dealing with "Administrative Procedure" (Chapter 5) and "Judicial Review" (Chapter 7). A cause of action for review of agency action is unavailable in the face of "clear and convincing evidence of legislative intention to preclude review." *Clarke*, 479 U.S. at 395 n.9. That is certainly the case here, since Congress could not have stated more clearly than it did in 39 U.S.C. 410(a) its intent to "preclude judicial review," 5 U.S.C. 701(a) (1), under the APA.<sup>5</sup>

<sup>5</sup> See *Spinks v. USPS*, 621 F.2d 987, 989 (9th Cir. 1980). Compare *Peoples Gas, Light & Coke Co. v. USPS*, 658 F.2d 1182, 1191 (7th Cir. 1981) (ruling that "nonstatutory judicial review" is available); *Lutz v. USPS*, 538 F. Supp. 1129, 1133 (E.D.N.Y. 1982) (suggesting without deciding that "nonstatutory judicial review" may be available); *Jordan v. Bolger*, 522 F. Supp. 1197, 1201-1202 (N.D. Miss. 1981) (39 U.S.C. 410(a) exempts the Postal Service from the APA, but dismissed employees are entitled to nonstatutory judicial review), *aff'd summarily*, 685 F.2d 1384 (5th Cir. 1982) (Table), *cert. denied*, 459 U.S. 1147 (1983); *Caldwell v. Bolger*, 520 F. Supp. 626, 628 (E.D.N.C. 1981); *NAACP v. USPS*, 398 F. Supp. 562, 563 (N.D. Ga. 1975). Cf. *National Ass'n of Postal Supervisors v. USPS*, 602 F.2d 420 (D.C. Cir. 1979) (noting that 39 U.S.C. 410(a) exempts the Postal Service from the APA, but resolving the merits of plaintiffs'

The court of appeals therefore erred in relying on this Court's formulation of the "zone of interests" test in *Clarke* to evaluate the unions' standing. *Clarke* stated that the "generous" zone of interests test is "most usefully understood as a gloss on the meaning of [APA] § 702," and not as a general prudential standing requirement that applies in all cases. 479 U.S. at 400-401 n.16. See also *Lujan v. National Wildlife Federation*, No. 89-640 (June 27, 1990) (*Lujan v. NWF*), slip op. 9-10.

The court of appeals recognized that the Postal Service is exempt from the provisions of the APA. Pet. App. 4a. It observed, however, that the Postal Service has provided by regulation that "[a]mendments of the regulations [such as the one at issue here] may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act." *Ibid.*, citing 39 C.F.R. 310.7 (emphasis added). That regulation, however, is simply a rule voluntarily adopted by the Postal Service to govern its internal operations. At most, it can be read to mean that the Postal Service has subjected itself to the provisions of Chapter 5 of the APA, which set forth the procedures to be used by an agency when it conducts rulemaking. See 5 U.S.C. 553. Not surprisingly, the

claims). In *Peoples Gas*, the Seventh Circuit ruled that the Postal Service's exemption from the judicial review provisions of the APA "does not negate the applicability of common law review principles that preexisted and operate apart from the subsequent codification" of the APA. For that reason, the court held that the Postal Service could be sued for allegedly violating one of its own procurement regulations. 658 F.2d at 1191.

The APA considered as a whole, including its 1976 amendments, see H.R. Rep. No. 1656, 94th Cong., 2d Sess. 1-27 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 2-26 (1976), was designed to adopt a uniform mechanism for judicial review, cf. *Block v. North Dakota*, 461 U.S. 273, 280-286 (1983) (Quiet Title Act of 1972 is the exclusive means of challenging the United States' title to real property), so it is far from clear that "common law review principles" survive the APA. Cf. *Brown v. GSA*, 425 U.S. 820 (1976). In any event, no such basis for review has been invoked in this case. If the APA is inapplicable, a plaintiff must identify some authority for his action. In this case, none of the other statutes cited by the unions expressly or impliedly authorize this action.

regulation does not subject the Postal Service to judicial review under the APA of such rulemaking proceedings. The court of appeals cited no other regulation by the Postal Service committing itself to the judicial review provisions of Chapter 7 of the APA. Accordingly, since the APA does not apply to this case, the court of appeals erred in affording the unions a right to judicial review on the basis of the APA "zone of interests" test.

**2. The interest of postal employees in job security is not within the "zone of interests" protected by the Private Express Statutes**

Even if the APA were applicable to this case, the court of appeals erred in holding that the unions can bring this action under it. Not every person suffering an injury in fact can bring suit under the APA. Parties (such as the respondent unions) can do so only if they are "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. 702; *Lujan v. NWF*, slip op. 8-9, i.e., only if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke*, 479 U.S. at 396 (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). The "zone of interests" test recognizes that, while the APA contains "generous review provisions," there is "potential for disruption inherent in allowing every party adversely affected by agency action to seek judicial review." *Clarke*, 479 U.S. at 395, 397. Accordingly, the "zone of interests" test excludes those plaintiffs "whose suits are more likely to frustrate than to further statutory objectives." *Id.* at 397 n.12 (quoting *Data Processing*, 397 U.S. at 154).

As the Court explained in *Clarke*, 479 U.S. at 399, "[t]he 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." The inquiry is whether Congress in-

tended that a particular class of plaintiffs would be relied on to challenge an agency's violation of a law. See *ibid.*; *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984). Accordingly, in cases like this one, where the plaintiff is not itself the object of the challenged agency action, "the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. Following that approach, we believe that it is quite clear that the respondent unions cannot bring this action under the APA.

a. Congress enacted the Private Express Statutes pursuant to its authority to establish "Post Offices and post Roads," U.S. Const. Art. I, § 8, Cl. 7, and the monopoly created by the PES has an ancient lineage. Postal monopolies were well established in England and Europe by the late Eighteenth Century, Act of 1710, 9 Anne 115, ch. 10, § 2; J. Johnston, *The United States Postal Monopoly*, 23 Bus. Law. 379, 380 (1968); see *United States Postal Serv. v. Brennan*, 574 F.2d 712, 714-715 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979), and one was chartered under the Articles of Confederation, Act of Oct. 18, 1782, 23 J. Continental Cong. 672-673 (G. Hunt ed. 1914). The First Congress carried that law forward on a temporary basis. Act of Sept. 22, 1789, ch. 16, 1 Stat. 70; Act of Aug. 4, 1790, ch. 36, 1 Stat. 178; Act of Mar. 3, 1791, ch. 23, 1 Stat. 218. In 1792, Congress enacted its first permanent postal statute, which outlawed the private carriage of "any letter or letters, packet or packets, other than newspapers, for hire or reward." Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236. The Postal Act of 1845, ch. 43, § 9, 5 Stat. 735, which prohibited the establishment of any "private express," adopted the Private Express Statutes in essentially the form they have today, *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 122 (1981); J. Johnston, *supra*, 23 Bus. Law. at 386; *The Post-Office Monopoly*, 1 Monthly L. Rep. 385, 390-392 (1849); see

18 U.S.C. 1693-1699; 39 U.S.C. 601-606, despite numerous subsequent revisions and recodifications.<sup>6</sup>

Throughout their history, the Private Express Statutes have been designed to serve as a revenue protection measure for the Postal Service. They facilitate the nationwide delivery of mail by protecting the Postal Service's monopoly on the carriage of letters and therefore its revenues,<sup>7</sup> as the federal courts have consistently recognized. See *Regents of the University of California v. Public Employment Relations Board*, 108 S. Ct. at 1408.<sup>8</sup> Congress has directed the Postal Service to "pro-

<sup>6</sup> See Act of Mar. 3, 1847, ch. 63, § 13, 9 Stat. 201; Act of June 27, 1848, ch. 79, § 2, 9 Stat. 241; Act of Aug. 31, 1852, ch. 113, §§ 5, 8, 10 Stat. 140, 141; Act of Mar. 2, 1861, ch. 73, § 4, 12 Stat. 204; Act of Mar. 3, 1863, ch. 71, § 31, 12 Stat. 706; Act of Mar. 25, 1864, ch. 40, §§ 2, 7, 13 Stat. 36, 37; Act of Mar. 3, 1865, ch. 80, § 10, 13 Stat. 506; Act of June 8, 1872, ch. 335, §§ 222, 224, 227-239, 17 Stat. 310, 311-312; Rev. Stat. §§ 3977-3978, 3981-3993 (1878); Act of Mar. 3, 1879, ch. 180, 20 Stat. 355-356; Act of June 11, 1880, ch. 206, 21 Stat. 177; Act of Mar. 4, 1909, ch. 321, §§ 180-186, 200, 203-204, 35 Stat. 1123-1124, 1126, 1127; Act of June 30, 1926, ch. 712, 44 Stat. (Pt. 1) 483-490, 1265-1266; Act of Feb. 6, 1929, ch. 157, 45 Stat. 1153; Act of June 22, 1934, ch. 716, 48 Stat. 1207; Act of June 29, 1938, ch. 805, 52 Stat. 1231; Act of June 25, 1948, ch. 645, 62 Stat. 776; Act of Sept. 25, 1951, ch. 413, 65 Stat. 336; Act of July 3, 1952, ch. 553, 66 Stat. 325; Act of Sept. 2, 1960, Pub. L. No. 86-682, 74 Stat. 586; Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified at 39 U.S.C. 101-5605).

<sup>7</sup> See, e.g., H.R. Rep. No. 477, 28th Cong., 1st Sess. 1-4 (1844); S. Rep. No. 137, 28th Cong., 1st Sess. 10 (1844); *Report of Postmaster General Wickliffe to the President* 4-7 (Dec. 2, 1843), reprinted in *Message from the President to Congress*, S. Doc. No. 66, 28th Cong., 1st Sess. 596-599 (1843). Letter from Postmaster General Johnson to Congress, S. Doc. No. 373, 29th Cong., 1st Sess. (1846). See generally J. Haldi, *supra*; Craig & Alvis, 12 U.S.F. L. Rev. at 60, 70-77.

<sup>8</sup> See also, e.g., *Greenburgh Civic Ass'ns*, 453 U.S. at 122; *Ex parte Jackson*, 96 U.S. 727, 735 (1878); *United States v. Bromley*, 53 U.S. (12 How.) 88, 96-97 (1851); *United States Postal Service v. Brennan*, 574 F.2d 712, 713-715 (2d Cir. 1978), cert. denied,

vide prompt, reliable, and efficient services to patrons in all areas and [to] render postal services to all communities." 39 U.S.C. 101(a). Moreover, since 1863 the United States has had a basic postage rate for letter mail that has not varied with the distance the letter travels. Board of Governors of the Postal Service, *Statutes Restricting Private Carriage of Mail and Their Administration*, H.R. Doc. No. 5, 93d Cong., 1st Sess. 4 (Comm. Print 1973) [hereinafter *1973 Postal Service Report*]. See 39 U.S.C. 3623(d) ("The rate for each such class [of mail] shall be uniform throughout the United States, its territories, and possessions."). Thus, it costs no more to send a first-class letter from Maine to California than it costs to send the same letter across the street.

The Private Express Statutes enable the Postal Service to fulfill its responsibility to provide service to all communities at a uniform rate by preventing private courier services from competing selectively with the Postal Service on its most profitable routes. Absent these laws, private carriers could "skim the cream" from the Postal Service's revenues by serving only selected, highly profitable areas, such as cities and other high-density regions. Under the scheme established by Congress pursuant to its express constitutional authority, these high-density regions subsidize mail deliveries to and from rural areas and between distant points, thus permitting a single postage rate to be charged nationwide. H.R. Rep. No. 477, 28th Cong., 1st Sess. 1-2 (1844); S. Rep. No. 137, 28th Cong., 1st Sess. 10 (1844); *1973 Postal Service Report* 113-117. If competitors could serve the low-

439 U.S. 1115 (1979); *United States v. Black*, 569 F.2d 1111, 1112-1113 (10th Cir.), cert. denied, 435 U.S. 944 (1978); *Williams v. Wells Fargo & Co. Express*, 177 F. 352, 357-358 (8th Cir. 1910); *Blackham v. Gresham*, 16 F. 609, 612 (C.C.S.D.N.Y. 1883); *United States v. Thompson*, 28 F. Cas. 97, 98 (D. Mass. 1846) (No. 16,489); *United States v. Hall*, 26 F. Cas. 75, 78 (C.C.E.D. Pa. 1844) (No. 15,281).

cost segment of the market, leaving the Postal Service to handle the high-cost services, the Service would lose lucrative portions of its business, thereby increasing its average unit cost and requiring higher prices to all users. The Report of The President's Comm'n on Postal Organization, *Towards Postal Excellence* 129 (1968). In sum, as the Second Circuit has explained, the postal monopoly "is an appropriate and plainly adapted means of providing postal service beneficial to the citizenry at large." *Brennan*, 574 F.2d at 716; *Blackham v. Gresham*, 16 F. 609, 612 (C.C.S.D.N.Y. 1883) (the postal monopoly exists "for the interest of all").

Under these circumstances, the unions' interest is not even arguably within the "zone of interests" protected or regulated by the PES. The unions have an interest in protecting current and future job opportunities for postal employees. Nothing in the text or legislative history of the PES, however, indicates that the PES were designed to benefit a union's interest in protecting its members' jobs.<sup>9</sup> Any claim to the contrary is implausible, because the PES essentially took their current shape in 1845, *Greenburgh Civic Ass'ns*, 453 U.S. at 122, when federal employees lacked any tenure protection and federal employee unions were unheard of.

The unions' interest is also not plausibly related to the revenue-protection policies of the PES. For example, the PES allow a letter to be carried by a private courier if the letter bears the required postage. 39 U.S.C. 601(a). Clearly, that provision serves the purposes of the PES, but just as clearly imperils the job opportunities of postal employees. Moreover, the Postal Service's authority to suspend the postal monopoly when "the public

<sup>9</sup> *American Postal Workers Union v. Independent Postal System of America, Inc.*, 481 F.2d 90 (6th Cir. 1973), cert. dismissed, 415 U.S. 901 (1974). Contra *National Ass'n of Letter Carriers v. Independent Postal System of America, Inc.*, 470 F.2d 265, 270-271 (10th Cir. 1972).

interest requires" shows that Congress imposed the monopoly not as an end in itself, but in order to further the public interest, and that the public interest at times may indicate that the monopoly is unwarranted. But according to the unions, any suspension of that monopoly endangers the job opportunities of postal employees. Thus, as the district court noted, "Service employees and their Unions will *always* have an incentive to challenge a suspension of the PES, without regard to the relationship between the suspension and the 'public interest' as contemplated by [39 U.S.C.] 601(b)." Pet. App. 32a n.2. In fact, postal employees and their unions will have an incentive to litigate "even when the 'interest' protected by the PES clearly and unequivocally favors a suspension." *Ibid.* Thus, the unions are "reliable private attorney[s] general," *Clarke*, 479 U.S. at 397 n.12 (citation omitted), only in the sense that they can be relied on to bring suit challenging virtually every suspension, and not in the sense that their suits are more likely to further than frustrate the objectives of the PES or the Postal Service in general.

The effect of the decision below, therefore, is to empower postal employees and their unions to invoke the APA to challenge any and every suspension of the PES by the Postal Service, and any and every other action by the Service that has some potential effect on its revenue. Because Congress did not remotely intend that the PES would enable postal workers to use the courts to supervise the daily financial decisions of the Postal Service, the decision below is clearly wrong. Cf. *National Fed'n of Fed'l Employees v. Cheney*, 883 F.2d 1038, 1041-1052 (federal employee union lacked standing under several federal laws to challenge administrative decisions to contract out work), reh'g denied, 892 F.2d 98 (D.C. Cir. 1989), cert. denied, No. 89-1501 (June 18, 1990).

b. The court of appeals relied on the Postal Reorganization Act of 1970 (PRA) in ruling that the unions met the "zone of interests" test. The court reasoned that

the PES were re-enacted by the PRA, that the unions' interest "is embraced directly by the labor reform provisions of the PRA," and that "[t]he PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service." Pet. App. 8a. The court concluded that "[t]he interplay between the PES and the entire PRA persuades us that there is an 'arguable' or 'plausible' relationship between the purposes of the PES and the interests of the Union[s]." *Id.* at 8a-9a. That conclusion is wrong, for several reasons.

This Court recently discussed the requirements of APA § 702 in *Lujan v. NWF*, slip op. 9-10, 12. *Lujan* explained that "to be 'adversely affected or aggrieved . . . within the meaning' of a statute" for purposes of APA § 702, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision *whose violation forms the legal basis for his complaint*." *Lujan v. NWF*, slip op. 9 (emphasis in original and added; citing *Clarke*, 479 U.S. at 396-397). The Court reiterated that point later in its opinion, stating that "[t]he relevant statute, of course, is the statute whose violation is the gravamen of the complaint." *Lujan v. NWF*, slip op. 12. In this case, the "relevant statute[s]" for purposes of APA § 702 are the PES, because it is the "public interest" element of 39 U.S.C. 601(b) that the Postal Service is alleged to have violated by suspending the PES in order to allow international remailing. Compl. paras. 12-16. The court of appeals relied upon the "labor reform provisions of the PRA," Pet. App. 8a; see 39 U.S.C. 1201-1209, but the unions have asserted no violation of one of *those* laws. The court of appeals therefore simply relied on the wrong statute when performing its "zone of interests" analysis.

To be sure, the "zone of interests" test permits a court to "consider any provision that helps [it] to understand Congress' overall purposes." *Clarke*, 479 U.S. at 401.

But the court of appeals identified nothing in the labor provisions of the PRA that had any particular bearing on Congress's intent in readopting—unchanged—the PES. Indeed, that court itself noted that Congress incorporated the PES into the PRA "*without substantive modification*," Pet. App. 8a (emphasis added). Accord H.R. Rep. No. 1104, 91st Cong., 2d Sess. 11, 44 (1970).

c. The court of appeals also held that the unions' interest in protecting the jobs of postal workers was arguably within the "revenue protective purposes" of the PES, because it "is scarcely deniable" that "postal workers benefit from the PES's function in ensuring a sufficient revenue base." Pet. App. 9a. That reasoning is also flawed, since it confuses the requirements of Article III with those of the APA.

A plaintiff must prove some injury-in-fact—some actual or threatened harm—as "an irreducible minimum" in order to establish his standing to bring suit in federal court. *Valley Forge Christian College v. Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Allen v. Wright*, 468 U.S. 737, 751 (1984). But this Court's decisions in *Clarke* and *Lujan v. NWF* make clear that a plaintiff must prove *more* than mere injury-in-fact to show that he is "adversely affected or aggrieved \* \* \* within the meaning of a relevant statute" in order to bring suit under APA § 702. *Clarke*, 479 U.S. at 395-396; *Lujan v. NWF*, slip op. 9-10. *Clarke* and *Lujan v. NWF* state that in order to invoke APA § 702, the plaintiff must establish that the type of injury he has suffered or faces is one that Congress arguably sought to protect against by the statute on which he relies, and that he is the type of plaintiff that Congress designed the statute to protect. As *Lujan v. NWF*, slip op. 9-10, explained:

[T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and tran-

scribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

See also *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 144-145 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

In this case, the unions alleged that the suspension of the PES for international remailing has "directly affected" the "employment opportunities" of union members by reducing the Postal Service's revenue. Compl. para. 16; Pet. App. 30a-31a, 34a. The risk that union members may lose their jobs may constitute an injury-in-fact that satisfies Article III, *National Maritime Union v. Commander, MSC*, 824 F.2d 1228, 1235 (D.C. Cir. 1987), but it is not the type of injury that the PES were intended to forestall, and postal workers are not the persons Congress intended to protect by the PES. The court of appeals therefore confused the injury-in-fact necessary to satisfy Article III with the type of injury required by APA § 702.

As the district court noted, accepting the unions' position "would implicitly grant standing under § 702 to any agency employee whose job or employment opportunities were threatened as a result of an agency decision." Pet. App. 34a n.4. Every agency daily makes innumerable decisions that affect the allocation of its resources and ultimately the job prospects of its employees. If the "zone of interests" test were satisfied by the allegation that an agency's action could reduce the number of its current or future workers, there would be few agency actions that could not be challenged by employees or their unions. As the district court correctly noted, however, "[i]t is unreasonable \* \* \* to assume that Congress intended to make § 702 available to any disgruntled agency employee." Pet. App. 34a n.4.

## **B. The Unions Cannot Bring This Suit Under The Private Express Statutes**

If the Court concludes that the unions cannot bring this suit under the APA, the Court could reverse the judgment below without addressing the question whether the unions could bring this action under any of the other statutes they cited in their complaint. Since the unions may rely on one of those statutes before this Court, however, we will address them in the sections below.

### **1. The Private Express Statutes do not supply postal employees with an express right of action**

In their complaint, the unions sought relief under the PES, not the APA. J.A. 107. The PES, however, do not contain an express right of action authorizing postal employees (or their unions) to sue the Postal Service in federal court for improperly suspending the operation of the PES. The power to enforce the postal monopoly, like the power to enforce other criminal laws, is granted to the federal government alone. The Department of Justice has the responsibility of furnishing the Postal Service with legal representation, 39 U.S.C. 409(d), and prosecution of federal criminal cases is entrusted by other laws to the Attorney General, 28 U.S.C. 516. Accordingly, the PES do not expressly authorize the unions to bring this action.

### **2. Postal employees do not have an implied private right of action under the Private Express Statutes**

Because the PES do not expressly authorize the unions to bring this action, the unions may do so only if a private cause of action can be implied under the PES. No such implied action can be found.

a. At the outset, it is doubtful that the courts should ever imply a private right of action against the federal government. The implied private right of action doctrine

has typically been invoked by a private party seeking to enforce a federal statute against another *non-federal* party. In such a case, the question arises whether Congress intended to afford the injured party the right himself to enforce a federal statute directly against a non-federal party, instead of being limited to asking the federal government to enforce that law. Without an implied private right of action, the argument goes, a private party injured by a violation of federal law would have no remedy against the responsible, non-federal party. See *Women's Equity Action League v. Cavazos*, No. 88-5065 (D.C. Cir. June 26, 1990).

That is generally not the case when a private party seeks to enforce a federal law against a federal agency. There is ordinarily no need for an implied private right of action in such cases, because the APA ordinarily supplies an express cause of action that is adequate to provide relief for an injured party. As Judge Breyer has explained, "[s]ince the APA offers a set of general rules for judicial review, see 5 U.S.C. §§ 701-706, since it incorporates by reference other, more specific statutory proceedings, see 5 U.S.C. § 703, and since it tends to expand relief beyond what other statutes offer, not to contract it, see, e.g., § 706(2)(A) (forbidding 'arbitrary, capricious' agency action), it is difficult to imagine a case where an implied private right of action under some other statute would be of much use to a plaintiff who wants to challenge agency action." *Cousins v. Secretary of DOT*, 880 F.2d 603, 606 (1st Cir. 1989) (en banc). See also *NAACP v. Secretary of HUD*, 817 F.2d 149, 152-153 (1st Cir. 1987).

The fact that Congress has precluded judicial review under the APA—as it has done here—buttresses that analysis. Implying a private right of action against the government under such circumstances would be inconsistent with Congress's decision to withdraw the APA as a remedy for unlawful agency action. The question whether there is an implied private right of action is

ultimately a question of congressional intent. *Karahalios v. National Fed'n of Fed'l Employees, Local 1263*, 109 S. Ct. 1282, 1286 (1989). If Congress has withdrawn the APA as a remedy for unlawful agency action, that is a clear signal of Congress's belief that an alleged violation of federal law should be enforced through the political process, and not through the courts at the behest of private parties.

Congress designed the APA as a statute that would provide a single, uniform method for review of agency actions. *Cousins*, 880 F.2d at 606 ("The APA was designed to supplant a variety of pre-existing methods for obtaining review that differed from one agency to another and sometimes hindered the efforts of injured persons to obtain relief.").<sup>10</sup> Treating the APA as a law that "exhausts the field" provides a clear orderly procedural mechanism for deciding what injured parties may bring their claim against federal agencies in the courts. By contrast, allowing lawsuits seeking review of agency action "once again to proliferate under a variety of names would threaten a return to pre-APA confusion." *Ibid.*, citing *Report of the Attorney General on Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 79-82 (1941). See pp. 10-11 & note 5, *supra*.

b. Even if it would be permissible in some case to imply a private right of action against the government,

<sup>10</sup> See H.R. Rep. No. 1980, 79th Cong., 2d Sess. 275 (1946) 275 (APA §§ 701-706 "require[] adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings"); S. Rep. No. 442, 76th Cong., 1st Sess. 9-10 (1939) (concerning earlier version of the APA) ("unfortunately," existing statutes do not provide for "a uniform method and scope of judicial review"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-141 (1967) (legislative material "manifests a congressional intention that it cover a broad spectrum of administrative actions"). Cf. *Block v. North Dakota*, 461 U.S. 273, 280-286 (1983) (Quiet Title Act of 1972 is the exclusive means of challenging the United States' title to real property).

it would not be appropriate to do so here. The standard for implying a private right of action is far stricter than the "zone of interests" inquiry under the APA. *Clarke*, 479 U.S. at 400-401 n.16. Thus, if we are correct that the unions' alleged injury is not within the "zone of interests" protected by the PES, it follows that the PES also do not contain an implied private right of action against the Postal Service.

The "focal point" in determining whether a private right of action is implied by a federal law, the Court has explained, "is Congress' intent in enacting the statute." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). The "ultimate issue is whether Congress intended to create a private cause of action," *Karahalios*, 109 S. Ct. at 1286 (quoting *California v. Sierra Club*, 451 U.S. 287, 293 (1981)); in the absence of such intent, "the essential predicate for implication of a private remedy simply does not exist." *Karahalios*, 109 S. Ct. at 1286 (quoting *Thompson*, 484 U.S. at 179). The factors relevant to that inquiry include the text of the statute, its legislative history, and its purpose and structure. 109 S. Ct. at 1286-1288; *Thompson*, 484 U.S. at 180-186; *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 535-536 (1984); *California v. Sierra Club*, 451 U.S. at 293; *Cort v. Ash*, 422 U.S. 66, 78 (1975).<sup>11</sup> Under that approach, the PES do not contain an implied private right of action.

<sup>11</sup> *Cort* said that the question involves four factors: (1) whether the plaintiff is a member of the class for whose *especial* benefit the statute was enacted; (2) the legislative intent; (3) the consistency of such a right with the legislative scheme; and (4) whether the right of action is one traditionally relegated to state law. 422 U.S. at 78. Since *Cort*, however, the Court has made clear that its factors are only guides to congressional intent. See *California v. Sierra Club*, 451 U.S. at 297-298 (when the first two *Cort* factors do not suggest that the Act was intended to create an implied private right of action, "it is unnecessary to inquire further," since the last two *Cort* factors "are only of relevance if the first two factors give indication of congressional intent to create the remedy"); *Universities Research Ass'n v.outu*, 450 U.S. 754, 770-771 n.21 (1981) (where neither the statute nor its

i. The text of the PES contains no hint that Congress intended to give postal employees (or their unions) the right to sue the Postal Service for claims that the Service has improperly suspended its monopoly. As explained above, the text of the PES does not "explicitly confer[] a right directly on" postal employees or their unions. *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Rather, the statutory language does no more than outlaw the private carriage of mail over the post roads, empower the government to enforce that law, and authorize the Postal Service to suspend its monopoly when the public interest requires it. The provisions of the PES making it a criminal offense to engage in the private carriage of mail, like other criminal statutes, show that the PES were enacted for the benefit and "protection of the general public," *id.* at 690, and not postal employees or their unions. That is a powerful indication that the PES contain no implied private right of action for such a class of plaintiffs. See *California v. Sierra Club*, 451 U.S. at 294; *Cort v. Ash*, 422 U.S. at 80. See generally *Cannon*, 441 U.S. at 690 n.13 ("the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action").

The statutory ban on the private carriage of letters can be said to benefit postal employees in an indirect manner. The PES help the Postal Service to obtain revenue and thereby to employ postal workers. In that sense, postal employees benefit from the operation of the postal monopoly.<sup>12</sup> But that approach to this question is clearly wrong.

legislative history indicates an intent to create an implied private right of action, the remaining *Cort* factors cannot by themselves serve as a basis for implying one); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979) (same); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576 (1979) (same).

<sup>12</sup> That reasoning persuaded the Tenth Circuit in *National Ass'n of Letter Carriers v. Independent Postal System of America, Inc.*,

To begin with, it is implausible to suggest that postal employees are among "the class for whose *especial* benefit the statute was enacted." *Cort v. Ash*, 422 U.S. at 78 (citation omitted). The PES were enacted for the benefit of the public, not postal employees. Moreover, the relevant issues are "not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries," *California v. Sierra Club*, 451 U.S. at 294, and whether Congress intended that such rights would "be enforced through private litigation," *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979). The Court has consistently ruled that statutory language of the type present here, which makes particular conduct a criminal offense, does not indicate that Congress intended to create a private right of action to enforce that law. See *California v. Sierra Club*, 451 U.S. at 294; *Cort v. Ash*, 422 U.S. at 80-85. See generally *Cannon*, 441 U.S. at 690-693 n.13 (collecting cases); *ibid.* ("the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large").

In this respect, the PES are similar to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, which makes it a crime to obstruct the navigable waterways of the United States. In *California v. Sierra Club*, *supra*, the Court held that the text of the latter statute gave no indication that Congress intended to allow private parties to enforce its terms. As the Court explained, "the statute states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries

470 F.2d at 270-271, which held that postal unions can bring suit under the PES against competitors. The Sixth Circuit later rejected that result and that reasoning in *American Postal Workers Union v. Independent Postal System of America, Inc.*, 481 F.2d at 93.

whose welfare Congress intended to further." 451 U.S. at 294. It was "the kind of general ban which carries with it no implication of an intent to confer rights on a particular class of persons." *Ibid.*

ii. The purpose and legislative history of the PES also do not support implying a private right of action against the Postal Service. Those features demonstrate that the PES were designed to benefit the public at large by protecting the Postal Service from competition by private courier services that would operate only the profitable routes. Pp. 13-16, *supra*. Also, the enforcement provisions of the PES were designed to enable the government, not postal employees, to protect its monopoly, because only the government is given such enforcement authority. Here then, as in *California v. Sierra Club*, 451 U.S. at 295, "Congress was not concerned with the rights of individuals." Moreover, there is no evidence that "Congress anticipated that there would be a private remedy." *Id.* at 298. Under these circumstances, there is no basis for inferring that Congress intended to allow the unions to enforce the PES in federal court. *Ibid.*; *Coutu*, 450 U.S. at 770-771 n.21; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576 (1979); pp. 24-25 & note 11, *supra*.

#### C. The Unions Cannot Prevail In This Suit Under The Mandamus Statute Or The Declaratory Judgment Act

In their complaint, the unions also cited the mandamus statute, 28 U.S.C. 1361, and the Declaratory Judgment Act, 28 U.S.C. 2201. These provisions do not give the unions the right to judicial review in this case.

Mandamus is warranted only if the defendant owes the plaintiff a clear nondiscretionary duty. *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 424 (1988); *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988); *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976). In this case, the Postal Service did not

breach any clear nondiscretionary duty owed to the unions or their members. The Postal Service construed the "public interest" language in 39 U.S.C. 601(b) in suspending the operation of the PES for international remailing. The court of appeals concluded that the Service had acted arbitrarily and capriciously because it adopted an unduly "narrow interpretation of the 'public interest.'" Pet. App. 14a. But even assuming that the Postal Service's decision was incorrect, mandamus is still not available. As this Court has explained, when the existence of a duty "depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilber v. United States ex rel. Kadrie*, 281 U.S. 206, 219 (1930). That is clearly the case here.

Section 601(b) does not define the term "public interest," and it entrusts the public interest determination to the judgment of the Postal Service. This Court's decisions construing similar "public interest" language in other statutes indicate that substantial deference is owed to an agency's judgment as to how the public interest is best served. See e.g., *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978). Indeed, the Court has characterized the "public interest" standard of the Communications Act of 1934, 47 U.S.C. 303, as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *WNCN Listeners Guild*, 450 U.S. at 593. For example, in *WNCN Listeners Guild*, this Court held that the FCC's interpretation of the "public interest" in that Act, "when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for 'the weighing of policies under the "public interest" standard is a task that Congress has delegated to the [agency] in the first instance.'" 450

U.S. at 596 (quoting *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 810). The Postal Service did precisely that in this case. In deciding to suspend the PES for international remailing, the Postal Service assessed the harm of the potential loss of revenue to the Service and on balance concluded that a suspension of the PES for international remailing would best serve the public interest. Since the Postal Service's judgment was "based on consideration of permissible factors and is otherwise reasonable," 450 U.S. at 594 (*FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 793), the Service's view of the public interest should not be set aside at all, but clearly cannot be set aside under mandamus, even if that decision was wrong. See also *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

Even the court of appeals recognized that the "public interest" standard in 39 U.S.C. 601(b) is "sweeping," Pet. App. 12a, and confers "broad discretion" on the Service to define the "public interest." *Id.* at 14a. In fact, the court of appeals confessed "no doubt that Congress intended to confer a substantial degree of discretion on the USPS" to implement that standard. *Id.* at 13a. Under these circumstances, mandamus is clearly unwarranted.

Nor can the unions bring this action under the Declaratory Judgment Act. "[T]he operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). It "authorizes relief," *ibid.*, in the nature of a "declar[ation of] the rights and other legal relations of any interested party seeking such declaration," 28 U.S.C. 2201. But the Act does not itself create any legal rights, nor does it expand the authority of the federal courts to adjudicate a dispute. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."); *Public Service Comm'n v.*

*Wycoff Co.*, 344 U.S. 237, 242-243 (1952); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. at 239-240; 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2751, at 569 (1983). The Declaratory Judgment Act therefore cannot supply the unions with an express or implied right of action to maintain this suit.

## II. THE POSTAL SERVICE REASONABLY SUSPENDED ITS MONOPOLY IN ORDER TO PERMIT INTERNATIONAL REMAILING

Even if this action could be brought, the court of appeals erred in setting aside the Postal Service's considered decision to suspend its monopoly and authorize international remailing. The decisions of this Court clearly delineate the respective roles of administrative agencies and reviewing courts. Agencies have the duty to assess relevant factual and policy considerations and to "weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974) (citation omitted). Put another way, the agency's function is "not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945). An agency may render its judgment based on predictions and accumulated experience in the industry, instead of purely factual determinations. A "forecast of the direction in which [the] future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 814 (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); *WNCN Listeners Guild*, 450 U.S. at 595.

By contrast, the function of a reviewing court is limited. See *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Bowman Transportation, Inc.*, 419 U.S. at 285; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). An agency would act arbitrarily and capriciously if it relied on factors that Congress did not intend it to consider; if it completely failed to consider an important aspect of the problem; if it offered an explanation for its decision that is contrary to the evidence before the agency; or if it adopted a solution so implausible that it could not be ascribed to a difference in view or the product of agency expertise. See *State Farm*, 463 U.S. at 43. At the same time, that a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion," *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946), particularly when the agency's decision is based on its analysis of public policy, which is "entitled to the greatest amount of weight by appellate courts." *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947).

### A. The Postal Service Considered The Relevant Factors

The Postal Service started the rulemaking process with a proposed rule that was designed to make clear that the practice of international remailing was unlawful. Although the proposed rule was in accord with the Service's interpretation of the then-existing regulations regarding the scope of the postal monopoly and suspensions thereunder,<sup>13</sup> that proposal evoked a very strong negative response. The overwhelming majority of comments filed during the notice and comment periods criticized the rule initially proposed by the Service and urged the continuance of international remailing. Comments

<sup>13</sup> The Postal Service had concluded that the practice of international remailing was an abuse of the cost test used to satisfy the suspension for extremely urgent letters. See Hawley Decl. paras. 4-5, 1 C.A. App. 70-71.

cited the lower cost charged by remailers for their services,<sup>14</sup> the faster delivery and greater reliability of private courier services,<sup>15</sup> the more responsive service offered by such courier services,<sup>16</sup> and the benefits to the public and the Postal Service of a competitive market for international mail services,<sup>17</sup> all of which enhanced

<sup>14</sup> See, e.g., 2 C.A. App. 137 ("It was not feasible in the past to solicit orders for Mosby products via direct mail in the international marketplace due to the high cost of postage. In 1985 we discovered that by using a private remailing company we could reduce our postage costs by as much as 60% thus making it profitable to sell via direct mail overseas. If it were not for remailers we wouldn't be doing ANY direct mail, therefore, the U.S.P.S. has not been 'deprived' of anything. Furthermore, our products are mailed to our customers via the U.S. Postal Service so the orders we lose by eliminating direct mail will result in a proportionate loss of business for YOU."); 2 *id.* at 500-510 (Newsweek and other publishers would not be able to operate in Canada without cost savings from private remail.). See also, e.g., 2 *id.* at 119-146, 138, 164, 205, 213, 231, 334-370, 378-384, 386-387, 390-406, 409-410, 432.

<sup>15</sup> See, e.g., 2 C.A. App. 488-497 (in-house study by Chase Manhattan Bank found that delivery time on letters sent through the Postal Service were as much as five days longer than for those sent through a remail service); 2 *id.* at 489 ("Exhibit 1 demonstrates by summary data that, on our last two test periods, private remail service has proven to be faster. The same results have been obtained over the two year period during which we have used private remail services."); 2 *id.* at 362 ("[D]elivery time has been cut to a three to four day delivery to the door of our Nalco subsidiaries."). See also, e.g., 2 *id.* at 104, 106, 108-109, 110, 119-120, 121, 138, 139-146, 248-332, 334-336, 339-340, 343-352, 354-355, 357-359, 365-367, 368-369, 378-384, 386-387, 407-408.

<sup>16</sup> See 2 C.A. App. 119-120 ("We have our mail collected and sorted for us. \* \* \* We receive compensation for service failures on a weekly basis. \* \* \* We have direct contact with our remail company's customer service and tracing department."); 2 *id.* at 166 ("Private couriers respond within 24 hours and Express Mail can take up to three weeks.").

<sup>17</sup> See 2 C.A. App. 180-181 (noting increase in Express Mail revenues from \$133-\$489 million from 1979-1984), 187, 203-210, 257, 269-271, 287-288.

the ability of American firms to remain competitive internationally.<sup>18</sup> See generally 2 C.A. App. 102-106, 108-110, 119-456, 470-474, 479-481, 486-534, 633-677. Executive and Legislative Branch officials also voiced strong opposition to the proposed rule banning international remailing. See 2 *id.* at 111-118, 183-211, 420-423, 428-429, 433-456, 470, 473-478.<sup>19</sup>

<sup>18</sup> See, e.g., 2 C.A. 106 ("Only by using private courier services have we been able to maintain an acceptable standard of service and compete with electronic media."); 2 *id.* at 124-125 ("[do not] restrict the activities of remailers[,] whose services my company, as do many others, need to remain competitive in the foreign markets."); 2 *id.* at 164 ("[I]f this rule change takes effect \* \* \* we would have to sell out to a foreign publisher and the U.S. Post Office would then get none of our business."); 2 *id.* at 221-222, 273-277.

<sup>19</sup> See, e.g., J.A. 19-40 (comments of Department of Justice Antitrust Division); J.A. 42 (Congressmen Mickey Leland, Chairman, Frank Horton, Ranking Minority Member, and Robert Garcia, Member, of the Subcommittee on Postal Operations and Services) ("Weighed against this uncertain legal authority is the certain public benefit that accrues from private sector competition in the provision of international postal services. In these circumstances, the public interest would be poorly served by amendments of the Postal Service's regulations to prohibit a specialized form of remailer competition in the provision of international mail service."); J.A. 46 (James Miller, III, Director, Office of Management and Budget) ("The proposed changes would harm consumers of international mail services by increasing their costs and reducing the quality and variety of international mail services available to them. Since most of the users of international remailers' services are U.S. firms with international activities, this action would also reduce U.S. competitiveness abroad."); J.A. 45 (Secretary of Commerce Malcolm Baldrige) ("The proposal to restrict international remail service should be put aside on the basis of business' expressed needs and U.S. trade policy."); 2 C.A. App. 450 (Beryl W. Sprinkel, Chairman of the Counsel of Economic Advisers) ("We have serious concerns about the proposed rules. Remailers offer services to United States businesses competing abroad and do so at costs and terms that are viewed by users as better than those offered by the Postal Service. Remail services benefit these users and the United

The notice and comment process worked the way it is supposed to. The Postal Service, on the basis of what it learned, changed its proposed rule. The administrative record reflects strong support for the rule ultimately adopted by the Postal Service.

The court of appeals held that the suspension of the monopoly was arbitrary and capricious because the Postal Service had failed sufficiently to consider the effect of the suspension on its revenue, the protection of which was the "core purpose of the PES." Pet. App. 14a. The court concluded that "[t]he USPS's interpretation of the 'public interest' is not reasonable since it did not give sufficient attention to how revenue losses might affect cost and service of other postal patrons." *Ibid.* Contrary to the court of appeals' conclusion, however, the Postal Service in fact adequately considered *all* of the relevant factors in suspending the PES for international remailing, including the effect of the suspension on postal revenues.

The Postal Service recognized both at the very outset of the rulemaking process and at its completion that it was difficult to assess the impact of international remailing on the Service's revenues due to the lack of comprehensive data on the number of letters or the dollars in revenue diverted from the Service by that practice. See 2 C.A. App. 114; 51 Fed. Reg. 29,636, 29,637 (1986).<sup>20</sup> For that reason, the Service assessed

States economy and increase our competitiveness abroad. Thus, the proposed restrictions on remail services would reduce consumer welfare and would not accord with the policy of the Administration."); J.A. 43 (Attorney General Edwin Meese III) ("there are significant public benefits from lawful private sector competition in the provision of international postal services."); 2 C.A. App. 527 (President Ronald Reagan).

<sup>20</sup> In an affidavit filed in district court, Postal Service Assistant General Counsel Charles Hawley explained that "[t]he in-house data systems of the Postal Service are not designed to measure how much of the surface and air mail volume loss of recent years is due

the effect on its revenues of the proposed suspension by using the most pessimistic forecast. The Service concluded that, even under the bleakest forecast, the amount of revenue that could potentially be lost by the Postal Service was not so adverse as to outweigh the benefits to the public interest from permitting international remailing. *Ibid.* In balancing the harm from the potential revenue loss against the perceived benefits to the public interest, the Service assumed that the amount of revenue diverted would be equal to the *total* amount of revenues to the Postal Service from international mail during the most recent period: *i.e.*, \$882.3 million, or 3.2% of all postal revenues, 51 Fed. Reg. 21,929, 21,931 (1986); Hawley Decl. para. 12, J.A. 122—an amount that was undoubtedly overinclusive, because it necessarily included mail that was already subject to competition under the applicable laws. The Postal Service also assumed that it would lose *all* international mail volume. 51 Fed. Reg. at 21,931; Hawley Decl. para. 12, J.A. 122.<sup>21</sup>

to the remail industry. The relative newness of the remail industry, combined with competition from other forms of international communication, such as electronic communication, has made such data collection infeasible." Hawley Decl. para. 12, J.A. 122. Some comments on the proposed rule addressed this question and estimated that the revenue loss from international remailing was minimal. See, *e.g.*, 2 C.A. App. 290-297 (International Remail Committee estimated that the Postal Service's proposed rule would net only \$3 million, which would add little to the Service's \$24 billion annual budget).

<sup>21</sup> In its discussion, incorporated into the final rule, of the June 1986 proposed rule, the Postal Service stated that it had used just such a "worst case scenario" figure, and explained its actions as follows, 51 Fed. Reg. 21,931 (1986):

There is little or no reliable information as to the amount of revenues diverted to date by the activities of remailers. Estimates run from about \$25 million to \$500 million annually. One comment to the original proposal concluded that the net revenue loss to the Postal Service was in the neighborhood of \$3 million a year. Without attempting to determine the accuracy of these estimates, we can say that the total amount of

Of course, the lack of comprehensive data is not fatal in the rulemaking process. When the available data do not settle a regulatory issue, "the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *State Farm*, 463 U.S. at 52. That is precisely what the Postal Service did here. Contrary to the court of appeals' determination, the Postal Service's consideration of the factors outlined above in defining the "public interest" is fully consistent with the purposes of the PES. Clearly, the Postal Service "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Ibid.* Under these circumstances, the court of appeals erred in refusing to defer to the Postal Service's judgment that the "public interest required" suspending the PES for international remailing.

#### **B. The Postal Service Reasonably Explained Why The "Public Interest Required" The Suspension**

The Postal Service engaged in precisely the type of reasoned analysis during the rulemaking process required by the APA. The Service announced its proposed rule and sought public comment. 50 Fed. Reg. 41,462 (1985). Based on those comments, the Postal Service withdrew the proposed rule and embarked on a new information gathering and rulemaking process. 51 Fed. Reg. 9852 (1986); 51 Fed. Reg. 21,929 (1986). In announcing the Postal Service's decision to reverse its proposed course and initiate a new rulemaking proceeding "to remove the cloud" over international remailing, John McKean, Chair-

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revenues of the Postal Service from international mail—much of which is not letters and so is not protected from competition by the Statutes—was \$882.3 million for the most recently published figures. Annual Report of the Postmaster General, 1985. We conclude that the loss of revenues of what is necessarily a lesser amount is not so adverse to the Postal Service as to outweigh the perceived benefits to the public interest from allowing remailing to continue by virtue of the suspension which follows.

man of the Postal Service Board of Governors, explained that, 51 Fed. Reg. at 9853:

The remail issue has generated considerable controversy about the proper scope of the monopoly under which we operate. It is worth emphasizing that Congress entrusted us with this monopoly not for our own benefit but in order to let us better serve the American people. The critical question raised by this rulemaking is whether enforcement of the monopoly in this context would advance or retard consumer welfare and the interests of this nation.

\* \* \* \* \*

Many businesses appear to view the private sector alternative as preferable to the service we are providing—preferable in terms of price and service. That tells us something important about the way we are now doing our job in this area. The monopoly was not intended to protect us from having to face up to our own shortcomings. I am glad to say that the competition from private remailers has already spurred us on to improve our own efforts and be more competitive in providing international mail services.

As things now stand, therefore, remail services would appear to advance consumer welfare while at the same time fostering innovation and economic efficiency.

The Board of Governors does not believe that any attempt to suppress this kind of competition would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people. Yet we have to deal with the laws and regulations now on the books. As now drafted, they do not appear to leave room for the lawful operation of international remail services. At the very least there is a serious question on this point.

The Board of Governors believes that the appropriate course of action under these circumstances is to change our regulations to make them conform to sound public policy. Accordingly, we are announc-

ing today that the Postal Service will soon be initiating another rulemaking proceeding, this time to remove the cloud that now hangs over the international remail services and preserve the benefits of desirable competition between the Postal Service and private companies.

In the ensuing period, private parties and public officials again expressed the view that private couriers engaged in international remailing were valuable due to their lower cost, faster delivery and better overall service. 2 C.A. App. 470-474, 479-481, 486-534, 633-677. In response, the Postal Service observed in the discussion accompanying its June 1986 notice of proposed rulemaking that, 51 Fed. Reg. at 21,930:

It is clear that the overwhelming majority of those who have commented favor a regulation which permits [international remailing] services. The reasons which they advance are several: It is faster, less expensive, more reliable, and more responsive than the air mail service provided by the Postal Service. It is said that American business is better able to compete in foreign markets when service of this nature is available. Competition in the provision of international letter delivery service is also said to be inherently beneficial, both to the customers who use this service and to the Postal Service itself.

In addition to considering the comments received from private and public parties, the Service made an independent inquiry into whether a suspension was in the public interest. 51 Fed. Reg. at 21,931. See Hawley Decl. paras. 11-12, J.A. 121-122. In so doing, the Postal Service acknowledged that, in certain respects, the comments did not contain the depth of factual analysis or the degree of precision that the Service would have liked. *Ibid.* But the Service concluded that the benefits to the public interest were nonetheless apparent in light of the consistency of comments on this subject, the reasonableness of the conclusion that the availability of international remailing services helps Ameri-

can firms in international markets, and the Service's own knowledge that the cost of remailing services is lower than the cost for services provided by the Postal Service. *Ibid.* The conclusion is inescapable that the Postal Service "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'" *State Farm*, 463 U.S. at 43.

Similarly, in issuing the final rule, the Service again carefully examined the record, weighed the competing interests and addressed the concerns raised in the comments received. See 51 Fed. Reg. at 29,636-29,637. Among the points specifically addressed by the Service was the concern raised by the unions regarding the alleged inadequacy of the record to support the conclusion that the public interest required the suspension. *Ibid.* In this regard, the Postal Service acknowledged that it had not received the "precise," "detailed" and "comprehensive" information regarding remailing that it had hoped for, but noted that such information might well be unavailable due to the "diverse character of the remail industry and the relatively recent development of remailing." *Id.* at 29,637. The Postal Service concluded, however, that the record demonstrated that the public interest requirement had been satisfied and explained in detail the basis for this conclusion, *ibid.*, excerpted at Pet. App. 36a-37a:

The comments came primarily from American commercial enterprises, including financial institutions and publishers, that use the services of international remailers in conducting their business abroad. The comments were almost universally consistent in their observations regarding the level of service provided by remailers. Specifically, the comments asserted that remailing was faster than U.S. airmail and that this time savings is often critical to the ability of American businesses to compete in foreign markets. Moreover, the comments asserted that remailing serv-

ices were provided for a lesser cost than U.S. air-mail, thereby also enhancing the ability of American firms to compete abroad. Although the Postal Service did not receive across-the-board data on the level of service provided by remailers, many commenters did provide information, testimonial in nature, indicating that their use of remail services has resulted in time and cost savings. Numerous commenters noted that this time and cost differential was critical in order for letter matter being sent abroad to retain its commercial value. Several commenters also stated that without faster and cheaper services provided by remailers, it would not be feasible for their businesses to compete in the international markets. The Postal Service found it significant that the comments received in response to the October 10 notice, which proposed language to make clear that remailing is not authorized under the suspension for extremely urgent letters, were overwhelming in their support of remailing. The Department of Commerce informed us that international remailing is of benefit to American businesses in foreign markets, a position also reflected in comments from the Department of Justice and the Office of Management and Budget.

A review of the record therefore reveals that the Service identified the relevant questions, thoughtfully considered the comments received, and arrived at a judgment that rationally accommodated the ascertainable facts with the range of permissible policy judgments the Service is authorized to make. Such action is the epitome of rational and reasoned decisionmaking under the APA. See *State Farm*, 463 U.S. at 43. As the district court summarized, Pet. App. 37a:

The Service's explanation of its decision and the basis therefore, while perhaps lacking the factual specificity that might exist in a "regulatory utopia," can hardly be regarded as arbitrary, capricious and an abuse of discretion. \* \* \* The Service has identified the factors supporting its decision, drawn ra-

tional inferences where detailed facts did not exist and drawn a rational connection between the facts found and the decision made. The APA requires no more.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1990

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\* The Solicitor General is disqualified in this case.

## APPENDIX

### 1. 39 U.S.C. 410(a) provides:

Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

### 2. The Private Express Statutes, 18 U.S.C. 1693-1699 and 39 U.S.C. 601-606, provide in part:

#### a. 18 U.S.C. § 1696. Private express for letters and packets

(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town or place to any other city, town, or place, between which the mail is regularly carried, shall be fined not more than \$500 or imprisoned not more than six months.

#### b. 39 U.S.C. § 601. Letters carried out of the mail

\* \* \* \*

(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

### 3. 39 C.F.R. 320.8 provides in part:

(a) The operation of 39 U.S.C. 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the

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uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

4. 39 C.F.R. 310.7 provides:

Amendments of the regulations in this part and in Part 320 may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.

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No. 88-1418

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**In the Supreme Court of the United States**  
**OCTOBER TERM, 1990**

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**AIR COURIER CONFERENCE OF AMERICA, PETITIONER**

**v.**

**AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, ET AL.**

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**RESPONSE OF THE  
UNITED STATES POSTAL SERVICE  
TO THE MOTION TO DISMISS**

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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 89-1416

AIR COURIER CONFERENCE OF AMERICA, PETITIONER

v.

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, ET AL.

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*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**RESPONSE OF THE  
UNITED STATES POSTAL SERVICE  
TO THE MOTION TO DISMISS**

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The respondent unions have moved to dismiss the petition in this case for lack of jurisdiction on two grounds. First, they argue that there is no case or controversy over the validity of the international re-mailing regulation because the Postal Service did not seek review in this Court of the judgment below holding the regulation invalid. Mot. to Dis. 10. Second, the unions contend that petitioner Air Courier Conference lacks standing to seek review in this Court of the judgment below since petitioner has not shown that it faces a clear threat of prosecution under the Private Express Statutes (PES), 18 U.S.C. 1693-1699 and 39 U.S.C. 601-606, if the regulation

is held invalid. Mot. to Dis. 11. Both claims lack merit.

1. The unions concede that an Article III case or controversy would be present if the Postal Service had sought review in this Court of the judgment below, Mot. to Dis. 10, but they argue that no case or controversy now exists because the Postal Service did not file its own certiorari petition. *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297 (1983), however, demonstrates that the unions' claim is without merit.

The question in *Perini* was whether a private party, Raymond Churchill, was covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901. After the court of appeals held that Churchill was not, the federal government filed a certiorari petition, but Churchill did not. His employer argued that there was no case or controversy since the federal government did not have a financial interest in the outcome of the dispute and was, instead, interested only in the correct rule of law. This Court rejected that claim. 459 U.S. at 302-305. The Court reasoned that the Director, as a "party" in the court of appeals, was entitled under 28 U.S.C. 1254(1) to petition for a writ of certiorari; that Churchill, as an automatic respondent under Sup. Ct. R. 19.6 (1980) (current version at Sup. Ct. R. 12.4), was entitled to seek reversal of the court of appeals' judgment; and that Churchill had a sufficient interest in the outcome of the dispute to give him standing to urge this Court to resolve it.

This case is not materially different from *Perini*. The Air Courier Conference was a party in the district court and in the court of appeals and therefore under 28 U.S.C. 1254(1) can petition this Court to

review the court of appeals' judgment. The Air Courier Conference is a petitioner, seeking to have the judgment below reversed. The Postal Service, pursuant to Rule 12.4 of this Court's Rules, is a respondent supporting the petitioner. The unions are respondents defending the judgment below. Accordingly, here as in *Perini* the parties are aligned in a manner that shows there is an actual controversy between them. Moreover, the Air Courier Conference and the Postal Service each has a legally cognizable interest in having the judgment below reversed and the Service's regulation upheld. The Postal Service has an interest in having its regulation upheld as a lawful exercise of its delegated powers, and the Air Courier Conference, as champion of its members' interests, has an interest in seeing lifted the restrictions otherwise imposed by the PES on international remailing, so that those members will be free of the risk of criminal prosecution or civil suit. Under these circumstances, there clearly is a justiciable controversy before the Court.

Relying on *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)), the unions claim, however, that since the Postal Service "alone is entitled to create" an international remailing regulation, only the Postal Service has a "direct stake" in defending that regulation. The *Diamond* case, however, is inapposite.

In *Diamond*, the court of appeals held unconstitutional a state law making it a crime to perform abortions in certain circumstances. The State did not appeal that judgment to this Court, but a private party physician, who had intervened in the district court, took such an appeal. This Court ruled that the physician lacked standing to perfect an appeal. The

Court reasoned that just as "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," 476 U.S. at 64 (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973)); see 476 U.S. at 64-65 (collecting cases), so, too, a private citizen cannot step into the government's shoes in an attempt to defend over the government's objection the constitutionality of one of its criminal laws. *Id.* at 65.

By contrast, here a private party is not seeking to defend the validity of a law making it a criminal offense to engage in otherwise lawful conduct. On the contrary, the Air Courier Conference is seeking to uphold a regulation lifting the criminal sanctions otherwise applicable to the conduct of its members by creating an exception to the scope of a criminal law. For that reason, this case is the precise *opposite* of *Diamond*. A private party surely has a legally cognizable interest in the validity of a regulation immunizing that very party from criminal prosecution or civil liability. Because that is the interest the Air Courier Conference seeks to protect, it may do so even though the Postal Service (for the reasons set forth in its Opposition) did not file its own certiorari petition from the judgment below.

2. If we are right that this case is controlled by *Perini*, then there is no need to consider the unions' second challenge to the standing of the Air Courier Conference, since the controversy before this Court is justiciable for the reasons given in Point 1 regardless of how the Court resolves the unions' argument. In any event, that claim lacks merit.

The unions second claim is that the Air Courier Conference lacks standing because the Conference has not proved that its members will be prosecuted

if the judgment below is permitted to stand. Mot. to Dis. 11. Relying on statements in the administrative record by Department of Justice officials that members of the Air Courier Conference will not be criminally prosecuted for engaging in international remailing, the unions contend that the Air Courier Conference has not shown that the judgment below injures its members by exposing them to the threat of a criminal prosecution, since no such prosecutions will be brought. *Ibid.* That argument is flawed.

The judgment below held invalid the international remailing regulation and thus adversely affected the Air Courier Conference, since the regulation permitted its members to engage in international remailing free of the risk of a criminal prosecution. That regulation also provided those parties with greater protection than the statements cited by the unions. A statement by a law enforcement official that a certain type of prosecution will not be brought can be altered or revoked at the will of the official who uttered it (or any superior). By contrast, a regulation can be modified or revoked only by following the rulemaking provisions of the Administrative Procedure Act (APA), 5 U.S.C. 553. See *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). For that reason, if the international remailing regulation is upheld, private parties can follow that practice without risk of criminal liability, since the government must comply with its own regulations. See *United States v. Caceres*, 440 U.S. 741, 753-754 (1979).<sup>1</sup> Thus, by holding

<sup>1</sup> *Caceres* stated that an agency's failure to follow its own regulations can be challenged under the APA. 440 U.S. at 754. That is not true in this case, since the Postal Service is exempt

that regulation invalid, the judgment below had a real and immediate effect on the members of the Air Courier Conference.

This is simply a matter of common sense. There is a palpable difference between engaging in apparently criminal conduct in reliance on assurances from prosecutors that one will not be prosecuted, and engaging in the same conduct in light of a formal regulation specifying that such conduct is exempt from the criminal prohibition. That difference is plainly sufficient to support Article III standing.

The regulation also immunizes private parties from a civil action if they engage in international remailing. For example, the Tenth Circuit has held that postal employee unions can bring suit against parties that engage in practices violating the PES. *National Ass'n of Letter Carriers v. Independent Postal System of America, Inc.*, 470 F.2d 265 (1972). *Contra American Postal Workers Union v. Independent Postal System of America, Inc.*, 481 F.2d 90 (6th Cir. 1973), cert. dismissed, 415 U.S. 901 (1974). Significantly, the unions do not suggest that they will not sue members of the Air Courier Conference for engaging in international remailing if the judgment below is left undisturbed, and the

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from the APA, as we argued in our opening brief (at 9-12). Nonetheless, the Postal Service has adopted a regulation providing that the Service will follow the APA rulemaking provisions in amending its regulations. 39 C.F.R. 310.7. Although that regulation cannot be enforced under the APA, since the APA does not apply to the Postal Service, 39 U.S.C. 410(a), it can be enforced in an action brought under the mandamus statute, 28 U.S.C. 1361. Thus, the proposition stated in the text applies to the Postal Service as to other branches of the federal government.

very fact that the unions brought this action is a strong basis for believing that they would sue. Cf. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342 (1986).<sup>2</sup>

It is therefore respectfully submitted that the motion to dismiss the petition for lack of jurisdiction should be denied.

JOHN G. ROBERTS, JR.\*  
Acting Solicitor General

AUGUST 1990

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<sup>2</sup> The unions err in relying, Mot. to Dis. 11, on *Whitmore v. Arkansas*, 110 S. Ct. 1717 (1990). *Whitmore* held that a condemned state prisoner lacked standing to challenge in federal court the legality of the sentence imposed on another condemned prisoner. This Court found speculative *Whitmore's* claimed personal injury, which rested on the possibility that his already-final conviction or sentence would be set aside; that he would be retried for and reconvicted of a capital crime; that he would be resentenced to death; and that his death sentence would be set aside if it were compared against the sentence of the other prisoner whose cause *Whitmore* sought to champion. 110 S. Ct. at 1723-1725. That case is not remotely similar to this one. If the judgment below is reversed and the Postal Service's regulation upheld, the Conference will immediately enjoy the protection from criminal or civil liability that the regulation provides.

\* The Solicitor General is disqualified in this case.

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No. 89-1416

Supreme Court, U.S.  
FILED

AUG 17 1990

JOSEPH F. SPANGLER, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

AIR COURIER CONFERENCE OF AMERICA,  
*Petitioner,*  
v.

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, et al.,  
*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The District Of Columbia Circuit

PETITIONER'S OPPOSITION TO  
RESPONDENT UNIONS' MOTION  
TO DISMISS WRIT OF CERTIORARI  
FOR LACK OF JURISDICTION

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No. 89-1416

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In The  
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AIR COURIER CONFERENCE OF AMERICA,  
*Petitioner,*  
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On Writ Of Certiorari  
To The United States Court Of Appeals  
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PETITIONER'S OPPOSITION TO  
RESPONDENT UNIONS' MOTION  
TO DISMISS WRIT OF CERTIORARI  
FOR LACK OF JURISDICTION

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I. INTRODUCTION

Petitioner Air Courier Conference of America (ACCA) hereby opposes the Motion of Respondents American Postal Workers Union, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, to Dismiss the Writ for Lack of Jurisdiction (July 6, 1990) (Unions' Motion). The Unions argue that the Court improvidently granted ACCA's Petition for Writ of *Certiorari* (March 8,

1990), because: (1) the United States Postal Service's failure to petition for a writ of *certiorari* ended the case-or-controversy; (2) the Department of Justice's refusal to prosecute remailers under the Private Express Statutes (PES) deprives ACCA of standing under Article III; and (3) the district court erred by granting ACCA's motion to intervene below.

The Court should deny the motion, because there is a continuing case-or-controversy before the Court on the strength of both the Postal Service's presence and ACCA's independent standing. The Postal Service has filed a brief on the merits seeking reversal of the court of appeals' decision on both questions presented on *certiorari* and is therefore before the Court as a party adverse to the respondent Unions. ACCA's undisputed assertions of a direct interest in the subject-matter of the law suit below and irreparable injury from a successful challenge to the International Remail Rule (Rule) establish its independent standing pursuant to Article III. The Unions have waived their objections to ACCA's intervention and standing assertions which must be accepted as true and construed most favorably to ACCA. The Justice Department's refusal to prosecute remailers under the PES does not negate ACCA's independent standing, because remailers are subject to Postal Service searches and seizures under the PES.

In sum, the Court has jurisdiction over a continuing case-or-controversy based upon both the Postal Service's participation on *certiorari* seeking reversal of the court of appeals' decision and ACCA's independent standing. The Postal Service's failure to petition for *certiorari* is of no

substantive effect on the case-or-controversy before the Court.

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## II. STATEMENT OF FACTS

The Unions filed their complaint challenging the Postal Service's Rule on November 27, 1987. Jt. App. 107. ACCA made a timely motion to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure on January 29, 1988. Unions' Motion Appendix 2a (M.App.). In its supporting brief, ACCA stated that it was a trade association that included international remailers as members and those of its members engaged in remail account for virtually all remail business in the United States. *Id.* 36a. ACCA stated further that revocation of the Rule would cause irreparable injury to its members engaged in remail. *Id.* 4a. ACCA's brief went on to address each of the four requirements of the District of Columbia Circuit for intervention, including: (1) ACCA's "direct interest in the subject matter of th[e] lawsuit" (*id.* at 6a); (2) how an adverse decision would present ACCA's remailer members with the choice of foregoing \$ 50 million in annual sales or face civil suits and criminal prosecution under the PES (*id.* at 7a); and (3) that ACCA could not expect the Postal Service to adequately represent ACCA's interests, given its initial opposition to remail (*id.* at 8a-9a).

The Unions did not oppose ACCA's motion to intervene. The Postal Service also did not oppose ACCA's intervention, but suggested it be granted under Rule 24(b). The district court on February 26, 1988 issued an

order granting ACCA's motion pursuant to Rule 24(b) without comment. M.App. 1a.

ACCA participated in the cross-motions for summary judgment, supporting dismissal of the complaint in the district court. Jt. App. vii. ACCA monitored but did not participate in the appeal. Following the court of appeals' decision vacating summary judgment, but before its mandate issued, ACCA filed an appearance in the court of appeals. *Id.* at x. There is no deadline for filing appearances.

On March 8, 1990 ACCA filed its petition for a writ of *certiorari*. Although the Postal Service opposed the petition, it agreed that the court of appeals had erred and that ACCA is a proper petitioner.<sup>1</sup> The Unions opposed ACCA's petition, but failed to make any of the arguments advanced in Unions' instant motion.<sup>2</sup> On June 4, 1990 the Court granted ACCA's petition. On July 27, 1990, the date on which petitioner's brief was due, the Postal Service filed its brief on the merits seeking reversal of the court of appeals' decision on both questions presented to the Court by ACCA's petition.

<sup>1</sup> Brief of Federal Respondent in Opposition at 6-8 (May 9, 1990); *id.* n.1 citing *Bryant v. Yellen*, 447 U.S. 352 (1980). The Unions do not contest jurisdiction on the basis of ACCA's lack of participation, or the timing of ACCA's appearance, before the court of appeals.

<sup>2</sup> See Brief of American Postal Workers Union, AFL-CIO, and National Association of Letter Carriers, AFL-CIO in Opposition (May 9, 1990).

### III. DISCUSSION

#### A. THE POSTAL SERVICE'S PRESENCE ASSURES A CASE-OR-CONTROVERSY BEFORE THE COURT

By filing a 41 page brief on the merits in support of reversal of the court of appeals on both questions presented, the Postal Service guaranteed a continuing case-or-controversy within the Court's jurisdiction, irrespective of whether ACCA has independent standing. The Unions' reliance on *Diamond v. Charles*, 476 U.S. 54 (1986) as controlling a contrary result (Unions' Motion at 1-2, 10 *et seq.*) is misplaced. In *Diamond*, Justice O'Connor concurring, cited *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983) as holding that

once a case is properly brought here the case-or-controversy requirement can be satisfied even if the parties who are asserting their adverse interests before this Court are not formally aligned as adversaries.

476 U.S. at 72.

In *Perini*, the Director of Office Workers' Compensation Programs, not Churchill, the injured employee and the original claimant-appellant, filed for *certiorari*. Churchill filed a brief on the merits. The Court held that Churchill's presence "as a party respondent arguing for his coverage assures that an admittedly justifiable controversy is now before the Court." *Perini, supra*, 459 U.S. at 305. By contrast, the state of Illinois in *Diamond* merely filed a "letter of interest," filed no brief on the merits in support of its position below, and was therefore absent as an appellant. *Diamond, supra*, 476 U.S. at 61.

The facts here match *Perini's* and differ from *Diamond's*. Although the Postal Service did not petition, it remains a party pursuant to Rule 12.4. As the claimant in *Perini* and unlike the state of Illinois in *Diamond*, the Postal Service's filing of a brief on the merits, renders it an active "appellant" even though it is nominally a respondent.

Accordingly, the Court has jurisdiction of an active case-or-controversy.

#### B. ACCA'S INDEPENDENT STANDING SEPARATELY ASSURES A CASE-OR-CONTROVERSY

##### 1. The Unions' Challenges to ACCA's Intervention and Standing Assertions are Untimely

The Unions contend "that ACCA was not a proper intervenor in the district court, for the reasons explained in Justice O'Connor's concurring opinion in *Diamond v. Charles*, 476 U.S. 71" (Unions' Motion at 16, n.14); presumably, that it "asserts no actual, present interest that would permit [it] to sue or be sued by [respondents]." 476 U.S. at 77. The Unions, having failed to oppose intervention,<sup>3</sup> appeal the order granting it, cross-petition for *certiorari*, or oppose *certiorari* on the basis of ACCA's assertions of a direct interest and irreparable injury, it is

<sup>3</sup> Quite apart from the fact that ACCA asserted the type of interest in the litigation that Dr. Diamond did not, in *Diamond* the appellees, unlike the Unions here, *did* object to Dr. Diamond's intervention. 479 U.S. at 58.

simply too late for them to challenge either ACCA's intervention or its assertions of standing on the basis of which the district court granted intervention.<sup>4</sup>

Even if the Unions had challenged ACCA's standing assertions, they must be accepted as true and construed in favor of ACCA. *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). In *Pennell* the Court stated

that when standing is challenged on the basis of pleadings, we "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party."

ACCA's assertions in its motion to intervene are the counterpart of allegations in support of standing in a complaint. Accordingly, ACCA's assertions of interest and injury must be accepted as true and construed in its favor, particularly given that neither original party ever challenged those assertions below.

As difficult as the Unions' attempts to overcome ACCA's assertions would have been in opposition to ACCA's petition for writ of *certiorari*, they should be beyond challenge by motion after the Court has granted

<sup>4</sup> The Unions argue that "there was no occasion to raise the issue [of ACCA's intervention] in the court of appeals against the absent intervenor." Unions' Motion at 12 n.7. There was nothing to prevent the Unions from appealing the district court's intervention order except perhaps that, by having failed to oppose ACCA's motion to intervene, they were estopped from doing so. In any event, the Unions could not have known whether ACCA would participate in the appeal at the time they filed their notice of appeal, their docketing statement or appellants' brief. See *Jt. App.* ix.

the petition. Rule 15.1 of the Rules of the Supreme Court Rules admonishes counsel

that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later. Any defect of this sort in the proceeding below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition.

See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).<sup>5</sup>

It is far too late in this case for the Unions to seek review of the district court's order granting ACCA intervenor status. It is equally late for the Unions to question ACCA's assertions of a direct interest and irreparable injury in the guise of a jurisdictional attack on *certiorari*.

## 2. ACCA's Interest and Injury Establish Independent Standing Pursuant to Article III

ACCA's unassailable assertions of a direct interest in the Unions' suit below and of the irreparable injury to its

<sup>5</sup> The Unions may argue that Rule 15.1 does not apply because they have styled their motion as challenging jurisdiction. Calling a motion jurisdictional does not make it so. While the Unions' case-or-controversy argument, however erroneous, may indeed be jurisdictional, the underlying challenge to ACCA's assertions of a direct interest in the controversy and irreparable injury from the potential demise of the International Remail Rule are no more than an attempt to raise a factual issue concerning ACCA's assertions in support of its standing, or to present an improper and belated cross-petition for *certiorari* for review of the district court's order granting intervention, see Rule 12.3.

remailer members that would inevitably result from a successful challenge to the International Remail Rule confer standing under Article III. *Pennell, supra; Lujan v. National Wildlife Federation*, 58 U.S.L.W. 5077 (June 27, 1990). In *Pennell*, the Court found standing on allegations that

appellants' properties are "subject to the terms of" the Ordinance, and . . . that the Association represents "most of the residential unit owners in the city and has many hardship tenants." Accepting the truth of these statements, which appellants do not contest, it is not "unadorned speculation" to conclude that the Ordinance will be enforced against members of the Association.

485 U.S. at 6 (internal citations and punctuation omitted).

As in *Pennell*, ACCA has stated that its "members engage in remail pursuant to the regulation at issue," Pet. at 3, and that its members "account for virtually all the private remail business in the United States," M.App. 3a. ACCA's assertions relevant to standing as an intervenor, are identical to the assertions the Court found sufficient to establish standing by plaintiffs in *Pennell*.

ACCA's independent standing maintains the case-or-controversy, regardless of the Postal Service's status on *certiorari*. ACCA and the Unions are on opposite sides of both the standing issue and the merits of the Postal Service's adoption of the Rule. ACCA's direct interest in upholding the Rule and the direct and irreparable injury its members would suffer if the Rule were stricken assure that, even without the Postal Service's participation, the

legal questions presented to the Court by ACCA's petition "will be resolved in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action [and] . . . a factual setting in which the litigant asserts a claim of injury in fact." *Perini, supra*, 459 U.S. at 305.

Indeed, the Postal Service's initial inclination to ban remail (Pet. Cert. at 4-5), its ability to offer ISAL (International Surface Air Lift) service – its own version of remail (Jt. App. 35) – , and its freedom to do so without threat of civil suits or criminal prosecution, whether or not the Rule is upheld, presents ACCA with a greater stake and a more direct interest in the Rule than the Postal Service. ACCA's interest is far from that of a self-avowed "conscientious objector" or peripherally interested by-stander as that of the intervenor in *Diamond*. ACCA is the party most directly interested in the International Remail Rule. ACCA's independent interests and standing thereby assure that the legal questions it has presented will be resolved in an appropriately concrete factual context.<sup>6</sup>

<sup>6</sup> The Unions misplace their reliance, Unions' Motion at 10, upon the following language in *Diamond*: "because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' identified in *Sierra Club v. Morton*, 405 U.S. [727] at 740 [1972] in defending the standards embodied in that code." The statement is true on the facts in *Diamond*, but does not purport to be a general rule. See *City of Chicago v. Atchison Topeka & Santa Fe Ry.* 357 U.S. 77, 83 (1958) (intervenor had standing to defend city ordinance). The facts here are distinguishable: the Postal Service is not a state, but a government-owned corporation; the Rule is not a law, but a regulation; the Rule does not implicate Constitutional rights; and, most importantly, ACCA established a direct interest that Dr. Diamond did not.

### 3. The Justice Department's Refusal to Prosecute Remailers Does not Negate ACCA's Independent Standing

The Unions argue that ACCA lacks independent standing because the Justice Department's refusal of the Postal Service's requests for enforcement action against remailers precludes ACCA's members' asserted injury. Unions' Motion at 11. Insofar as the Unions seek to create an issue of fact, the Court should deem the Unions to have waived this argument by their failure to make it in opposition to ACCA's intervention, on appeal, or in opposition to *certiorari*. Rule 15.1. Should the Court in its discretion consider the Unions' argument, ACCA respectfully notes that the contention that prosecutorial discretion bars standing, is based on a faulty factual premise and is unsupported by the Unions' authorities.

First, the Unions' false premise, that only Justice Department action can injure remailers, is belied by 39 U.S.C. §§ 603-606. These provisions authorize Postal Service inspectors to search for, seize and dispose of materials that the Postal Service believes are improperly carried by remailers.

Second, the Unions have offered no legal authority that supports their proposition that a refusal to prosecute under prior law defeats standing to challenge or defend a new regulation modifying that prior law. The cases cited at pp. 11-12 of the Unions' motion are all irrelevant.<sup>7</sup> That

<sup>7</sup> *Whitmore v. Arkansas*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 1717 (1990) is a third party death penalty appeal. *Hall v. Beals*, 396 U.S. 45 (1969) involved a challenge to a residency requirement for

(Continued on following page)

one petitioner or appellant lacks standing on one set of facts or that another's case has been mooted on another set of facts does not address the merits of the Unions' proposition on the facts of this case where none of the cases discusses any legal principle the Unions attempt to advance.<sup>8</sup>

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(Continued from previous page)

voting that was mooted by an intervening amendment of the law and the passage of time. In *Los Angeles v. Lyons*, 461 U.S. 95 (1983) the plaintiff sought to enjoin the police department from using chokehold allegedly used on him. The Court found the chances of such hold ever being wrongfully used on him again were too remote to establish a case-or-controversy. As in *Diamond*, where Dr. Diamond was a "conscientious objector" to abortion, each of these cases involved plaintiffs with philosophical objections to death penalties, residency requirements and chokeholds that they had no more direct interest in challenging than the public at large. The Unions' reliance on *Pennell* is most curious inasmuch as the Court found standing on assertions identical to ACCA's. The Unions apparently confuse the Court's discussion of Constitutional ripeness in *Pennell* with the issue of standing here. In *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952) the Court reacted to the issue of whether plaintiff's request for a declaratory judgment that its activities were in interstate commerce as a "so what" to the existence of a justiciable case. *Id.* at 244. The Unions' authorities merit the same observation.

<sup>8</sup> Given that prosecutorial discretion will vary based on the facts, is subject to change over time and presumably will not be used to enforce prior law while an administrative suspension of that law is in effect, the Unions' argument, if adopted, would bar any intervenor from ever defending a regulation of which it is the beneficiary unless it was previously prosecuted under the prior law. Such a construction of standing would defeat the judicial efficiency rationale of intervention under Fed. R. Civ. P. 24.

In sum, the Unions' arguments based on the Justice Department's exercise of prosecutorial discretion are untimely and do not stand up to factual or legal scrutiny.

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#### IV. CONCLUSION

The Court has jurisdiction if either the Postal Service is present as an adverse party to the Unions or if ACCA has independent standing. For the foregoing reasons, jurisdiction exists on both grounds. Accordingly, petitioner ACCA respectfully requests the Court to deny the Unions' motion to dismiss the grant of *certiorari*.

Respectfully submitted,

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Dated: August 17, 1990

AMERICAN OVERSIGHT OF AMERICA

Postmaster,

AMERICAN POSTAL WORKERS UNION, AFL-CIO,  
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,  
and UNITED STATES POSTAL SERVICE

Respondents.

Re: Petition for Enforcement of the  
United States Court of Appeals  
for the District of Columbia Circuit

JOINT PETITION FOR RESPONDENTS  
AMERICAN POSTAL WORKERS UNION, AFL-CIO, AND  
NATIONAL ASSOCIATION OF LETTER CARRIERS,  
AFL-CIO

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## QUESTIONS PRESENTED

1. Whether the respondent unions had standing to bring a civil action seeking judicial review of the final rule promulgated by the United States Postal Service suspending the Private Express Statutes so as to permit the practice of international remailing.

2. Whether the court of appeals correctly held that the Postal Service's final rule suspending the Private Express Statutes for international remailing pursuant to 39 U.S.C. 601(b) was arbitrary and capricious because the Postal Service failed to consider the impact of the suspension on all postal patrons and failed to explain its reasons for rejecting several more narrowly defined suspension alternatives.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

\_\_\_\_\_  
No. 89-1416  
\_\_\_\_\_

AIR COURIER CONFERENCE OF AMERICA,  
*Petitioner,*  
v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO,  
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,  
and UNITED STATES POSTAL SERVICE,  
*Respondents.*

\_\_\_\_\_  
On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit  
\_\_\_\_\_

JOINT BRIEF FOR RESPONDENTS  
AMERICAN POSTAL WORKERS UNION, AFL-CIO, AND  
NATIONAL ASSOCIATION OF LETTER CARRIERS,  
AFL-CIO  
\_\_\_\_\_

STATEMENT<sup>1</sup>

1. On August 20, 1986, respondent United States Postal Service ("Postal Service" or "USPS") published a final regulation suspending in part the Private Express Statutes, 18 U.S.C. 1693-1699, 1729; 39 U.S.C. 601-606 ("PES"). The PES establish the postal monopoly. The partial suspension in question is for the purpose of permitting a practice known as international remailing.

<sup>1</sup> Respondents accept the specification of the opinions below, jurisdiction, and statutory and regulatory provisions involved, as set forth in the brief submitted on behalf of respondent Postal Service ("USPS Br.").

39 C.F.R. 320.8 (1986), Pet. App. 19a-26a, 51 Fed. Reg. 29,636 (1986). The new international remail regulation permits private carriers to deliver mail originating in the United States directly to foreign postal systems, bypassing the Postal Service.

On November 25, 1987, the respondents, American Postal Workers Union, AFL-CIO ("APWU") and National Association of Letter Carriers, AFL-CIO ("NALC") (hereafter "the Unions") brought this action for declaratory and injunctive relief challenging the regulation. APWU and NALC are national labor organizations representing more than 600,000 Postal Service employees whose employment opportunities would be adversely affected by the diversion of mail and revenue to private couriers permitted by the regulation. The crux of the Union's claim is that the suspension is contrary to the mandate of 39 U.S.C. 601(b) in that the administrative record failed to establish that "the public interest requires" a suspension of the PES for international remail.

The district court granted summary judgment for the Postal Service, holding that the Unions lack standing to bring the action and, further, that the Postal Service had not acted arbitrarily and capriciously or beyond statutory authority. The court of appeals reversed the district court on both issues and remanded the case to the Postal Service for further development of the administrative record.

2. The PES, reserving to the Postal Service a monopoly over the carriage of letters, date back at least to the Continental Congress. The statutes were enacted to ensure that the Post Office would have sufficient revenues to maintain universal service at uniform rates. *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589, 593 (1988) ("Regents"); *United States Postal Service Board of Governors, Statutes Restricting Private Carriage of Mail*

and *Their Administration*, Com. on Post Office and Civil Service Print No. 5, 93d Cong., 1st Sess. 5-7 (June 29, 1973) ("Governors' Report"). "[S]ince colonial times, the postal monopoly . . . has been regarded as the foundation of the country's postal system. Priest, *The History of the Postal Monopoly in the United States*, 18 J. of Law & Econ. 33 (1975) ("Hist."); see *Governors' Report* at 5-56. Private expresses were viewed by Congress in the nineteenth century as "selfish" and "predatory." Hist. at 65-66.<sup>2</sup>

3. The Postal Reorganization Act of 1970 ("PRA"), abolished the former cabinet-level Post Office Department and created the present Postal Service. The Postal Service, heretofore heavily subsidized, was required to be self-supporting, 39 U.S.C. 3621. See *National Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810, 813 (1983); *Regents*, 485 U.S. at 594. Congress considered and rejected an amendment during the floor debate on the PRA

<sup>2</sup> It is important to note that at no point prior to the 1970 postal reorganization did Congress intentionally authorize the Post Office to *suspend* the monopoly. The suspension authority now codified at 39 U.S.C. 601(b) was originally enacted in 1864, Act of March 25, 1864, ch. 40 Section 7, 13 Stat. 37, twelve years after enactment of the predecessor statute to the present 39 U.S.C. 601(a) which allowed private carriage of mail on which postage has been paid. Act of August 31, 1852, ch. 113 Section 8, 10 Stat. 141. The legislative history of the 1864 statute indicates that its purpose was to allow the Postmaster General to halt abuses of the stamped letters exception by suspending *the exception*, not the postal monopoly. See *Cong. Globe*, 38th Cong., 1st Sess. 1243 (1864) (statement of Rep. Alley). Prof. Priest summarizes the legislative history of the predecessor statutes to 39 U.S.C. 601(b) as follows:

Congress intended to establish an exception to the monopoly for the convenience of certain mailers, but only under conditions such that the revenue of the Post Office would not be harmed. . . . The Postmaster General's suspension power was the power to refuse this convenience—to prohibit private carriage under these conditions. . . . [Hist. at 79 n.228.]

ACCA's International Remail Committee agreed with this conclusion in the administrative proceedings below. See Court of Appeals Appendix at 312-317.

that would have eliminated the Private Express Statutes and allowed competition with the Postal Service. See 116 Cong. Rec. 9516-9517 (1970) (statement of Rep. Crane); *id.* at 20479 (1970) (statement of Rep. Udall) (noting that "high-volume, low-cost mail, would be peeled off by the private carriers and the Government would be left with the unprofitable business.") Congress, accordingly, reenacted the PES as part of the PRA.

In addition, the PRA required the Board of Governors to report and make recommendations to the President and Congress within two years on the "modernization" of the PES, based on a congressional finding that "a complete study and thorough reevaluation" of the PES was required. Pub. L. 91-375, section 7, 84 Stat. 783. The Governors' Report issued in 1973 concluded that the PES should be continued but not expanded, and that they should be administered in a systematic way through a rule-making process. Governors' Report at 9-14. The Governors found that the monopoly was essential to achieve the statutory policy of self-sufficiency. *Id.* at 6-7. The Report also suggested that the Postal Service could invoke authority under 39 U.S.C. 601(b) to implement narrowly drawn suspensions of the monopoly, but only "where there is a definite public need for delivery service that is substantially faster than any generally available service which the Postal Service now provides." *Id.* at 11.

4. Following the issuance of the Governors' Report, the Postal Service promulgated regulations, *inter alia*, adopting "the rule-making provisions of the Administrative Procedure Act," 39 C.F.R. 310.7, and creating certain narrow suspension of the postal monopoly. See 39 C.F.R. 320. In October 1979, the Postal Service adopted a regulation pursuant to its authority under 39 U.S.C. 601(b) suspending the operation of the Private Express Statutes for extremely urgent letters. 44 Fed. Reg. 61,181 (1979). The suspension was narrowly drawn and

established two tests to determine whether a letter is extremely urgent—a "loss of value" test and a "cost" test.<sup>3</sup>

On the promulgation of the urgent letter suspension, private mail services began relying on the suspension to justify the practice of international remailing in which private firms carry letters addressed to destinations outside the United States and deposit those letters in the mail stream of foreign postal administrations. Believing that the practice represented "a misuse of the urgent letter suspension" (*see* USPS Br. at 3), the Postal Service asked the Department of Justice to enjoin the practice. When the Department refused, the Postal Service initiated a rule-making proceeding in October 1985 to modify the urgent letter suspension to confirm that the suspension did not cover the practice of international remailing. 50 Fed. Reg. 41,462-64 (1985).

In March 1986, after receiving comments primarily from remailers and other members of the business community opposing the proposed rule-making, the Postal Service abruptly changed its position on international remailing. The Chairman of the Postal Service's Board of Governors, John R. McKean, announced the initiation of a new rule-making proceeding to consider whether the public interest required the suspension of the Private Express Statutes to allow international remailing. McKean's announcement was part of a notice published on March 21, 1986 in the Federal Register withdrawing the October, 1985 proposed rule and announcing that a new rule-making proceeding would be initiated "as soon as a factual record is fully developed." 51 Fed. Reg. 9853 (1986).

<sup>3</sup> Under the loss of value test, the letter must be delivered within a short, specified period of time after dispatch and the value of usefulness of the letter must be greatly diminished if not delivered within that period. The cost test is satisfied if the amount paid for private carriage is at least \$3.00 or twice the applicable U.S. postage for First-Class mail, whichever is the greater. 39 C.F.R. 320.6.

The Postal Service never developed such a factual record. In particular, the Service failed to analyze the effect of the loss of revenue resulting from the suspension on all other users of the mails. In both the June 17, 1986 notice of proposed rule-making and the notice published on August 20, 1986, announcing the final rule, the Postal Service acknowledged the lack of factual information in the record.<sup>4</sup>

The Service nonetheless concluded that the record "appears to demonstrate the existence of a public benefit to support the suspension" and, accordingly, published its final rule. 51 Fed. Reg. 29,636 (1986). This lawsuit followed.

#### SUMMARY OF ARGUMENT

1. The international remailing suspension is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701-706 ("APA"). The Court has "repeatedly acknowledged 'the strong presumption that Congress intends judicial review of agency action.'" *Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988). This presumption may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Id.*

In this instance, the government bases its contention that Congress intended to preclude review on section 410 (a) of the PRA. Section 410(a) provides, in pertinent part, that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5 [the APA], shall apply to the exercise of the powers of the Postal Service." The fairest reading of

<sup>4</sup> See e.g., 51 Fed. Reg. 21,931 (1986) where the Service acknowledged the "anecdotal character" of tables charting relative delivery times, the "imprecision of the data" on the need for private international remail, and the fact that there was "little or no reliable information as to the amount of revenues diverted to date by the activities of remailers"; *id.* at 29,636 (referring to failure "to obtain precise and detailed information").

these words is that the Postal Service is absolved from the APA *only* where the Service takes action which, but for the provisions of section 410(a), would have been covered by a law "dealing with" one of the enumerated subject matters: "contracts, property, works, officers, employees, budgets or funds." Postal Service actions under the Private Express Statutes are well outside the scope of the enumerated items of section 410.

The narrow reading of the APA exception that we suggest is supported by the specific legislative history of section 410(a) and reflects the basic themes of the legislative history of the PRA as a whole. Accordingly, it cannot be said that there is "clear and convincing evidence" of a congressional intent to preclude all judicial review under the APA.

Even if section 410 of the PRA renders the APA inapplicable, the Postal Service actions suspending the Private Express Statutes are subject to traditional "common law" or "non-statutory" review. The postal jurisdictional statutes, 39 U.S.C. 409 and 28 U.S.C. 1339, vest the federal courts with subject matter jurisdiction to entertain claims that the Service has violated the substantive provisions of the PRA or its own regulations, or that postal regulations are *ultra vires*. Case law demonstrates that the APA has not "supplanted" the common law, so that a holding that there is no APA review here does not mean that the Postal Service's action is totally unreviewable, as the government contends. Similarly, the cases provide no support for the government's contention that judicial review is available only upon a demonstration of the four factors in *Cort v. Ash*, 422 U.S. 66 (1975).

In any event, insofar as the Postal Service never argued in the lower courts that its purported exemption from the APA under section 410(a) precluded judicial review, and this question was not presented in ACCA's petition for writ of *certiorari*, the government is pre-

cluded from raising this issue for the first time in this Court. Since the APA is not jurisdictional, a defense based on exemption from the APA can be waived by the Postal Service. The Court should conduct its review of the questions presented in the *certiorari* petition—application of the zone of interests test and the merits—based on the assumption that the APA is applicable.

2. In *Clarke v. Securities Industry Association*, 479 U.S. 388, 395 (1982), the Court reaffirmed a test of standing which requires that “the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” That test is statute-specific, and “all indicators helpful in discerning [congressional] intent must be weighed.” *Id.* at 400. The test denies standing only where a plaintiff’s interests are “so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” *Id.* at 399. In assessing the Union’s standing to bring this action under section 601(b) of the PRA, the Court is “not limited to considering the statute under which [the Unions] sued, but may consider any provisions which help [the Court] understand Congress’ overall purposes in the [PRA].” *Id.* at 400. Here, there is no question that postal employees were among the specific beneficiaries of the PRA. That statute, which was “jointly developed, through the collective bargaining process”, H.R. Rep. No. 1104, 91st Cong., 2d Sess. 57 (1970) (“H. Rep.”), completely reformed all aspects of postal organization, including employee and labor relations. The PRA was enacted as a complete statutory scheme, the parts of which cannot be viewed in isolation. A critical component of this legislative reform—indeed, the very foundation of the postal establishment—was the reenactment of the PES. The interests of the Unions in protecting the employment opportunities of their mem-

bers which would be endangered by unauthorized dissipation of the monopoly promotes, rather than frustrates, statutory policies in the overall statute, clearly indicating that Congress did not intend to preclude suits of this sort. *Clarke*, 479 U.S. at 398-399.

The foregoing also demonstrates that, even if this action is not viewed as one arising under the Administrative Procedure Act, the Unions meet the prudential rule of standing suggested in *Clarke*, which would grant standing to those “for whose *especial* benefit the statute was enacted.” *Id.* at 400 n.16.

3. The court of appeals correctly overturned the international remail suspension. 39 U.S.C. 601(b) permits the Service to suspend its monopoly if—but *only* if—“the public interest *requires* such suspension.” (emphasis added). The international remail suspension did not comply with this standard because, as the court of appeals found, a) the suspension was intended solely to benefit a single segment of the Service’s consuming public, i.e. businesses engaged in commerce overseas, and b) the Service failed to consider the impact of the suspension on postal rates and service to those mailers who would continue to use the Postal Service.

## ARGUMENT

### I. THE INTERNATIONAL REMAILING SUSPENSION IS SUBJECT TO JUDICIAL REVIEW

The government, but not petitioner ACCA, advances the extreme contention that all postal regulations are entirely unreviewable.<sup>5</sup> According to the government, the Administrative Procedure Act ("APA") is inapplicable, and no other right of action is express or can be implied in the Postal Reorganization Act ("PRA"). USPS Br. at 9-12, 21-30. As discussed below (see pp. 25-27), the government's defense of non-reviewability is not properly before the Court because that defense was not advanced in the proceedings below and was not presented in the *certiorari* petition. We begin, however, by showing that the government's argument is without merit in any event.

#### A. The "Strong Presumption" In Favor Of Judicial Review

The Court has "repeatedly acknowledged 'the strong presumption that Congress intends judicial review of agency action.'" *Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988) (citation omitted). *Traynor*—the most recent of this Court's cases explaining the nature of the presumption—involved the question whether the refusal of the Veterans' Administration to allow two recovered alcoholics extensions of time in which to use their veterans' educational benefits was subject to judicial review under the Rehabilitation Act of 1973, 29 U.S.C. 794.

<sup>5</sup> ACCA obviously has a strong interest in preserving the right to challenge postal regulations affecting its members. Indeed, ACCA is the lead party in a case currently pending in the District of Delaware seeking to overturn an international mail rate. *Air Courier Conference of America/International Committee* Paragraph 1 of the complaint states:

This action arises under the Postal Reorganization Act of 1970, 84 Stat. 719, 39 U.S.C. § 101 *et seq.* (the "Act"), as amended. Jurisdiction is based on § 409(a), as well as on 28 U.S.C. § 1339 (Postal Matters).

Precisely as here, the government argued that review was precluded, citing 38 U.S.C. 211(a) which explicitly bars judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans." *Id.* at 1377.

The *Traynor* Court began its analysis by stressing that "clear and convincing evidence" of congressional intent is necessary to overcome the presumption in favor of judicial review:

The presumption in favor of judicial review may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent. . . . We look to such evidence as "'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.'" [108 S. Ct. at 1378 (citations omitted)].

The Court then concluded that the prohibitions of section 211 are "aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans. *Id.* at 1379 (emphasis in original, citing *Johnson v. Robison*, 415 U.S. 361 (1974)).

Accordingly, the Court held that "[t]he text and legislative history of § 211(a) . . . provide no clear and convincing evidence of any congressional intent to preclude a suit" under the Rehabilitation Act. *Id.* See also *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 674 (1986) ("The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent"); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778-780 (1985); *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984).

In this instance, the government bases its contention that Congress intended to preclude review on section 410 (a) of the PRA. As we now show, here, as in *Traynor*, neither the literal statutory language nor its legislative history, provide the *requisite clear and convincing evidence* of a congressional intent to bar judicial review of the Postal Service's administration of the Private Express Statutes.

### B. APA Review

The starting point is, of course, the language of the statute. *Fort Stewart Schools v. Federal Labor Relations Authority*, 58 U.S.L.W. 4624, 4625 (U.S. May 29, 1990). Section 410(a) reads:

Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapter 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

One fair reading of these words—and we submit the fairest reading—is that Congress intended to absolve the Postal Service from the APA *only* where the Service takes action which, but for the provisions of section 410 (a), would have been covered by a law “dealing with” one of the enumerated subject matters: “contracts, property, works, officers, employees, budgets or funds.”<sup>6</sup> See

<sup>6</sup> For example, the Postal Service publishes, and regularly amends, regulations contained in a wide variety of manuals covering every phase of postal operations (e.g., the Postal Operations Manual, Administrative Support Manual, Employee and Labor Relations Manual, and Financial Management Manual). See 39 C.F.R. 211.2 (defining the regulations of the Postal Service and listing manuals). The exemption set forth in section 410(a) means that the Postal Service, in implementing these regulations, need not comply with federal laws including the rule-making and judicial review provisions of the APA.

*National Retired Teachers Ass'n v. USPS*, 430 F. Supp. 141, 147 (D.D.C. 1977), *aff'd on other grounds*, 593 F.2d 1360 (D.C. Cir. 1979). But see, e.g., *National Easter Seal Society v. USPS*, 656 F.2d 754, 766 (D.C. Cir. 1981).

Had Congress intended to exempt the Postal Service from the APA altogether—and not only to exempt the Service from the APA as to contract and related matters—the natural locution would have been the use of a conjunction such as “and none of” before the phrase “the provisions of chapters 5 and 7 of title 5,” not the connective “including.” For the latter denotes that what follows is “a discrete or subordinate part or item of a larger aggregate [or] group”. *Webster's Third International Dictionary of the English Language (Unabridged)* (1986) at 1143. This construction of the statutory words is supported by cases applying the principles of *noscitur a sociis* and *ejusdem generis* to analogous statutes.<sup>7</sup>

<sup>7</sup> See, e.g., *Dole v. United Steelworkers of America*, 110 S.Ct. 929, 935 (1990) (“words grouped in a list should be given related meaning”, citing cases); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980). In *Harrison* the Court was asked to apply the rule of *ejusdem generis* to a provision of the Clean Air Act granting the federal courts of appeals, instead of the district courts, exclusive jurisdiction to review certain expressly specified actions of the Administrator of the Environmental Protection Agency “or any other final action of the Administrator under this Act . . . which is locally or regionally applicable. . . .” The respondents in *Harrison*—resisting the assertion of jurisdiction in the court of appeals—argued that the phrase “any other final action” should be limited to those final actions which are similar to the enumerated actions of the administrator previously specified in the statute. The majority rejected this construction on the ground that the rule of *ejusdem generis* applies only where there is uncertainty as to the meaning of the statutory language, and there was no uncertainty in the meaning of the relevant phrase. *Harrison*, 446 U.S. at 588.

Here, uncertainty as to the meaning of section 410(a) necessarily arises from the presumption of reviewability insofar as the construction proffered by the government would preclude judicial

Postal Service actions under the Private Express Statutes are, moreover, well outside the scope of the enumerated items of section 410. The enumerated items focus exclusively on the Postal Service's internal operations, i.e. on activities which are most like those of a private business, where efficiency and flexibility are of particular concern. By contrast, when the Service promulgates regulations implementing or suspending the Private Express Statutes, the Service is acting as a regulatory agency administering a public law by defining the rights and privileges of citizens and firms acting on their own and subject to both criminal and civil penalties; i.e. the Service is acting in an area in which the due process of law is a particular concern. See *Associated Third Class Mail Users v. USPS*, 600 F.2d 824, 826 n.5 (D.C. Cir.), cert. denied, 444 U.S. 837 (1979).

It is also very much to the point that the PRA's legislative history contains no indication that Congress contemplated that section 410 would generally exempt all Postal Service actions—including those outside the scope of the enumerated items—from judicial review under the APA. To the contrary, the APA is not even mentioned in the committee reports explaining the statutory language. Thus, the House Post Office and Civil Service Committee Report's section-by-section analysis of H.R. 17070 explains:

review altogether (rather than simply determine the proper forum as in *Harrison*). Cf. *id.* at 595-601 (Rehnquist, J., dissenting). Moreover, the use of the disjunctive article "or" in the Clean Air Act language construed in *Harrison* ("or any other final action") necessarily cuts against a linkage of the words at the end of the clause with the enumerated items which precede it. Here, the use of the word "including" in PRA Section 410(a) compels such linkage. See *F. W. Fitch Co. v. United States*, 323 U.S. 582, 585-6 (1945); see also *Smith v. Davis*, 323 U.S. 111, 116-7 (1944); *United States v. Salen*, 235 U.S. 237, 249 (1914); *United States v. Stever*, 222 U.S. 167, 174-5 (1911); *Bigelow v. Forrest*, 76 U.S. (9 Wall.) 339, 348-9 (1870).

Section 114<sup>18</sup>—Application of Other Laws.—This section excludes the operation of Federal laws dealing with Federal contracts, property, works, officers, employees or funds, except as provided in the title or in the bylaws of the Postal Service.

H.R. Rep. No. 1104; 91st Cong., 2d Sess. ("H. Rep.") at 26 (1970). Similarly, the Senate Post Office and Civil Service Committee Report on S. 3842<sup>9</sup> explains Section 410 as follows:

The Board of Governors shall have broad authority and shall not, except as specified, be subject to Federal laws dealing with contracts, property, and civil service system, the Budget and Accounting Act of 1921, apportionment of funds, and other laws which in most instances apply to Government agencies and functions.

S. Rep. No. 912, 91st Cong., 2d Sess. 5 (1970) ("S. Rep.").

Nor did any committee or member of Congress so much as suggest that section 410 constituted a blanket waiver of the APA. To the contrary, on the floor of the Senate, Senator McGee—the chairman of the Post Office and Civil Service Committee that reported the bill—characterized the laws which the bill made inapplicable to the Postal Service as those "relating to public works, contracts, employment, appropriations, budgeting, and any other laws governing agency operations". 116 Cong. Rec. 21,709 (1970). This statement directly supports the

<sup>18</sup> The provision which is now Section 410 appeared in H.R. 17070 as Section 114.

<sup>9</sup> S. 3842 amended H.R. 17070 by striking it in its entirety and substituting the Senate version. The Conference Committee accepted this, with amendments. H.R. Rep. No. 1363, 91st Cong., 2d Sess. 1, 79 (1970). The Conference Committee adopted the Senate version of the PRA. The comments of the managers on the part of the House included in the conference Report do not list the two formulations among those which are substantively different. *Id.* at 79.

proposition that PRA section 410(a) deals only with laws governing *internal agency operations*—i.e. the enumerated subjects—and the APA is inapplicable only with respect to administrative actions on those subjects.<sup>10</sup>

Beyond the specific references to section 410, the narrower reading of the APA exception that we suggest reflects the basic themes of the legislative history. As discussed more fully below (see pp. 30-39), a basic objective of postal reorganization was to “[e]liminate serious handicaps that are now imposed on the postal service by certain legislative, budgetary, financial, and personnel policies that are . . . inconsistent with modern management and business practices”. H. Rep. at 2. This objective is obviously furthered by allowing the Postal Service flexibility in administering its contracts, property, workers, officers, employees, budgets, and funds. As we noted above, that is precisely what section 410 fairly read ac-

<sup>10</sup> The origins of the PRA also support our suggested interpretation. As discussed below, the proposals that eventually resulted in the reorganization of the Post Office originated in the 1968 Report of the President's Commission on Postal Organization, entitled *Towards Postal Excellence* (1968) (“Kappel Report”). The report, while recommending exemption of the Postal Service from certain federal laws like personnel statutes, recognized the need to subject the Service to others, such as equal employment and conflict of interest laws, and the Hatch Act. Kappel Report, at 80-81. No mention is made of a blanket exception from the APA. In addition, the Commission's compilation of laws affecting postal operation characterized Title 5 as “generally cover[ing] employment.” *Id.* Annex vol. IV, at 7.73. The APA is not mentioned in the study.

We recognize that our analysis of the text and legislative history of PRA section 410 was rejected by the D.C. Circuit in *National Easter Seal Society v. USPS*, 656 F.2d at 766-8, and that other lower courts have held that section 410 exempts the Postal Service from the APA (although those courts have also recognized the availability of non-APA review under the postal jurisdictional statutes; see p. 19, n.13 *infra*). For the reasons stated above we submit that this conclusion is erroneous and should be rejected by the Court. *Cf. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

complishes. This rationale, however, does *not* justify an APA exemption for the Postal Service's actions having the force and effect of positive law under the Private Express Statutes.

Indeed, the government's claim that section 410 “is a clear signal of Congress' belief that an alleged violation of federal law should be enforced through the political process, and not through the courts at the behest of private parties,” (USPS Br. at 23), is directly contrary to express congressional intent. One of the primary purposes of the PRA was to free the Postal Service from “partisan political pressure” by insulating the Postal Service “from direct control by the President, the Bureau of the Budget and the Congress.” See Message from the President of the United States, 116 Cong. Rec. 12,203 (1970); see also S. Rep. at 8 (“The Committee simply, and hopefully, recommends that politics in the Post Office be abolished and authorizes the postal service to insure the fulfillment of that policy.”); 116 Cong. Rec. 27,599 (1970) (remarks of Rep. Ford).

In sum, the weight of the evidence strongly indicates that Congress had a limited purpose in enacting section 410(a). Plainly—in light of the statutory text and the foregoing—it *cannot* be said that there is “clear and convincing evidence” of a congressional intent to preclude *all* judicial review under the APA. This conclusion is further buttressed by established rules of construction governing APA coverage. Section 559 of the APA provides that “[s]ubsequent statutes may not be held to supersede or modify this chapter [i.e. chapter 5] [or] chapter 7 . . . except to the extent that it does so expressly.” 5 U.S.C. 559 (emphasis added).<sup>11</sup> Consistent

<sup>11</sup> In this connection, it is noteworthy that section 6 of the PRA amends various federal statutes, including provisions of Title 5 of the United States Code. The amendments excluded the new Postal Service from the list of “Executive departments” provided by 5 U.S.C. 101 and the definition of executive branch “independ-

with the presumption of review, the Court has held that section 559 makes APA Chapter 7 applicable in any case where there is doubt or ambiguity about the issue. See *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955) (ambiguity in the word "final" in the 1952 Immigration and Nationality Act subjects deportation orders to the APA); see also *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962). Section 410 of the PRA does not clearly and unambiguously exempt from the APA Postal Service activities outside the enumerated items. Accordingly, Section 559 of the APA makes chapter 7 applicable here.<sup>12</sup>

ent establishments" provided by 5 U.S.C. 104. See Pub. L. 91-375, Sec. 6(c). However, the technical amendments did not amend 5 U.S.C. 701(b)(1), listing those government entities that are subject to judicial review under the APA. This is another indication that what Congress intended in enacting section 410(a) was a partial exemption of the Postal Service from the APA, confined to the enumerated items, rather than a blanket prohibition of judicial review.

<sup>12</sup> As the court of appeals below observed, the Postal Service's regulations make the APA applicable to the Service's administration of the Private Express statutes so that "the APA provides the appropriate standards for evaluating the procedural and substantive issues in this case." 891 F.2d at 307. 39 C.F.R. 310.7 provides that:

Amendments of the regulations in this part and in part 320 [governing suspensions] may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.

PRA section 410(a) expressly permits the Postal Service to continue in force laws that would otherwise be inapplicable "as rules or regulations of the Postal Service". Congress thus granted the Postal Service the right to promulgate rules with the force of law imposing statutory requirements on itself.

The government would blunt the force of 39 C.F.R. 310.7 by the "interpretation" that the section encompasses only the notice and comment provisions of APA chapter 5 and not the judicial review provisions of chapter 7. But the language of the regulation is not limited to chapter 5. In fact, the regulation has been interpreted by the Postal Rate Commission as giving rise to judicial review under the APA. See Statement of General Policy Determining

### C. Non-APA Review

Even if section 410 of the PRA renders the APA inapplicable, the Postal Service actions suspending the Private Express Statutes are subject to traditional "common law" or "non-statutory" review. The postal jurisdictional statutes, 39 U.S.C. 409 and 28 U.S.C. 1339, vest the federal courts with subject-matter jurisdiction, respectively, "over all actions brought by or against the Postal Service" and over "any civil action arising under any Act of Congress relating to the Postal Service." Lower courts—including those who have ruled that APA review is unavailable by reason of section 410 of the PRA—have relied on these jurisdictional statutes to entertain claims that the Service has violated the substantive provisions of the PRA or its own regulations, or that postal regulations are *ultra vires*.<sup>13</sup>

Lack of Jurisdiction and Order Terminating Proceedings, *Regulations Implementing the Private Express Statutes*, Docket No. RM76-4, Order No. 133 (1976) at 24 (amendments to the private express regulations are "subject to judicial review under 5 U.S.C. §§ 701-706", citing 39 C.F.R. 310.7).

Indeed, the Postal Service has never previously argued that APA review of its actions under the PES is precluded. See *Associated Third Class Mail Users v. USPS*, 440 F. Supp. 1211, 1213 (D.D.C. 1977), *aff'd*, 600 F.2d 824 (D.C. Cir.), *cert. denied*, 444 U.S. 837 (1979), and discussion below at n.13. Accordingly, while we need not press the point, we would suggest that this is one instance where an agency's proffered interpretation of its own regulation is wrong. Cf. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1987) (stressing consistency of administrative interpretation).

<sup>13</sup> See *Combined Communications v. USPS*, 891 F.2d 1221, 1227-28 (6th Cir. 1989) ("a federal district court has jurisdiction under 28 U.S.C. § 1339, 39 U.S.C. § 409(a) and the 'well-established, common-law presumption favoring judicial review of administrative action' . . . to entertain the question of whether a final Postal Service regulation is *ultra vires*"); *Peoples Gas, Light and Coke Co. v. USPS*, 658 F.2d 1182, 1191 (7th Cir. 1981) (the Postal Service's "exemption from the provisions of the Administrative Procedure Act does not negate the applicability of common law review principles . . . . We conclude that the exemptions found in section 410 of the Postal Reorganization Act do not manifest a congressional

These decisions, endorsing the availability of non-APA or common law review in suits brought under the postal jurisdictional statutes, are firmly rooted in this Court's precedents. Before the APA was enacted in 1946, the Court allowed suits to be brought at common law challenging actions taken by the Postmaster General in the absence of any statutory provision expressly providing for such review. See *School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 412-13 (1921). See also *Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.").

intent to foreclose all judicial review of alleged violations [of] the Postal Service's . . . regulations."); *National Ass'n of Postal Supervisors v. USPS*, 602 F.2d 420, 429 (D.C. Cir. 1979) (postal jurisdictional statute "triggers the well-established presumption favoring judicial oversight of administrative activities").

See also *Jordan v. Bolger*, 522 F.Supp. 1197, 1201-02 (N.D. Miss. 1981) ("Despite the inapplicability of the APA, most federal courts have held that postal service employees are nonetheless entitled to nonstatutory judicial review of agency determinations."), *aff'd*, 685 F.2d 1384 (5th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); *Burns v. USPS*, 380 F. Supp. 623, 626 (S.D.N.Y. 1974) ("The fact that the APA is not applicable . . . does not indicate a congressional desire to foreclose judicial review"); *Withers v. USPS*, 417 F.Supp. 1, 3 (W.D. Mo. 1976).

In a number of cases the Postal Service did not even challenge the reviewability of its actions. For example, in *Associated Third Class Mail Users*, the plaintiff mailers brought suit under sections 409 and 1339 claiming that the Postal Service private express regulations improperly expanded the scope of the postal monopoly through its definition of the term "letter." 440 F. Supp. at 1213. The Postal Service never claimed that the regulation was not subject to judicial review; it simply defended the regulation on the merits. See also *Owen v. Mulligan*, 640 F.2d 1130, 1134 n. 10 (9th Cir. 1981) ("At oral argument [Postal Service] counsel conceded that if the suit is characterized as one requiring the Postal Service to follow its own regulations, there is jurisdiction.")

The government claims that the APA has "supplanted" the common law and that a holding that there is no APA review here must mean that the action is totally unreviewable. (USPS Br. at 22-23). As we understand it, the argument is that the doctrine of common law or non-statutory review is dead, and has been since 1946.<sup>14</sup> The authorities, however, show that the doctrine is very much alive.

As the Court held in *Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Co.*, 464 U.S. 30, 35-6 (1983):

It is a well-established principle of statutory construction that "[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose."

See also *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific"); *Continental Management, Inc. v. United States*, 527 F.2d 613, 620 (Ct. Cl. 1975) ("common law rights and reme-

<sup>14</sup> The government relies solely on two lower court decisions, *Cousins v. Secretary of DOT*, 880 F.2d 603, 606 (1st Cir. 1989), and *NAACP v. Secretary of HUD*, 817 F.2d 149, 152-53 (1st Cir. 1987), and legislative history of the APA establishing that the APA was designed to provide "a uniform method and scope of judicial review" and to "cover a broad spectrum of administrative actions" to support its argument that the APA "exhausts the field." USPS Br. at 22-23. However, the cases and legislative history cited merely establish that if the APA applies, Congress intended that the statute govern. For example, the court in *Cousins* found that "the APA not only should, but does, offer Cousins the type of review he seeks" and that it was "preferable" to call the lawsuit "a request for APA review, and not an exercise of an implied private right of action." 880 F.2d at 605. Likewise in *NAACP*, the court applied the provisions of the APA and rejected an attempt to invoke the private right of action doctrine. *NAACP*, 817 F.2d at 153.

dies survive, unless Congress intended the legislative provision to be "exclusive.").

The Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), after reviewing the legislative history of the APA, found that the Act served to "reinforce" pre-existing common law review:

Early cases in which this type of judicial review was entertained . . . have been *reinforced* by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). (Emphasis added).

Not surprisingly, then, the general understanding is that "common law" or "nonstatutory" review continues to be available. See Albert, *Standing to Challenge Administrative Action*, 83 Yale L.J. 425, 456-64 (1974), Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action; Some Conclusions from the Public Lands Cases*, 68 Mich. L. Rev. 867, 870 nn. 12-13, 913-14 (1970).<sup>15</sup>

For example, in *International Union, UAW v. Brock*, 477 U.S. 274 (1986), the Court allowed a direct challenge by a union, with no mention of the APA, of the Secretary of Labor's interpretation of the Trade Act since "there is no indication that Congress intended [the statute] to deprive federal district courts of subject-matter

<sup>15</sup> See also Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administration Action*, 81 Harv. L. Rev. 308 (1967). Professor Davis states without equivocation: "the law of reviewability is in all major respects the same as it would be without the APA." 7 K. Davis, *Administrative Law Treatise* § 28:1 at 256 (2d ed. 1984) (emphasis omitted).

jurisdiction" and "claims that a program is being operated in contravention of federal statute . . . can . . . be brought in federal court." *Id.* at 285. Likewise, in *Leedom v. Kyne*, 358 U.S. 184 (1958), the Court allowed a lawsuit brought by a union challenging the NLRB's decision to include professional employees in a unit with non-professional employees without their consent. This suit was brought not under the APA but directly under section 9(b)(1) of the NLRA "which commands that the Board 'shall not' do so." *Id.* at 186. The Court found that a cause of action shall be inferred from the "clear and mandatory" "shall" language of section 9(b)(1) in order to prevent

"a sacrifice or obliteration of a right which Congress" has given. . . . This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers. [*Id.* at 190.]

See also *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 673 (referring to "review under the grant of general federal-question jurisdiction found in 28 U.S.C. § 1331," not the APA); *Harmon v. Brucker*, 355 U.S. 579, 581-82, 585 n.5 (1958) (relying on pre-APA cases for the proposition that "[g]enerally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers," even where underlying statute expressly provides that "[a]ll functions performed under this title . . . shall be excluded from the operation of the Administrative Procedure Act"); *Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962); *Reilly v. Pinkus*, 338 U.S. 269 (1949).<sup>16</sup>

<sup>16</sup> In addition to the postal cases cited in note 13, *supra*, lower courts have also held that an exemption from the APA does not bar common law review in cases arising under statutes other than the PRA. See *San Juan Legal Serv., Inc. v. Legal Serv. Corp.*, 655 F.2d 434, 438 (1st Cir. 1981) (finding judicial review where statute silent as to review and APA not applicable since silence "does not indicate a legislative intent to preclude judicial review" and pre-

Significantly, no case has held that non-APA judicial review is available only upon a demonstration of the four factors in *Cort v. Ash*, 422 U.S. 66 (1975), as the government now argues. USPS Br. at 21. This argument basically confuses a private cause of action with the right of judicial review.<sup>17</sup> The former permits a private party *directly* to enforce statutory provisions; the latter simply submits to the courts the contention that the agency entrusted with enforcing a given statute has misinterpreted it. Understandably the law makes the burden of demonstrating a private cause of action a much more demanding one than that governing reviewability, which is presumed to be available. Private causes of action are disfavored, not presumed to exist, because the duty of enforcing public law belongs primarily to the government. By contrast, the right of review is implicit in every statute unless a congressional intent to deny it is shown by "clear and convincing evidence." *Community Nutrition*, 467 U.S. at 350, quoting *Abbott Laboratories v. Gardner*, 387 U.S. at 141.<sup>18</sup>

clusion of judicial review "is not lightly to be inferred"); *Spokane County Legal Serv. v. Legal Serv. Corp.*, 614 F.2d 662, 669 & n.11 (9th Cir. 1980) (since APA not applicable, court applied rule "which the Supreme Court fashioned for judicial review of administrative decisions before the advent of the APA" which has "no discernible difference [from] the 'arbitrary and capricious' standard"); *Szostak v. Railroad Retirement Bd.*, 370 F.2d 253, 255 (2d Cir. 1966) (exclusion from the APA "would not preclude review for abuse of discretion").

<sup>17</sup> Again, while the government relies on *Cousins v. Secretary of DOT*, the *Cousins* court noted that "[t]he concept of an implied private right of action serves a useful legal purpose elsewhere in the law, when a plaintiff seeks to enforce a federal statute against a non-federal person." 880 F.2d at 606 (emphasis added). Accord *NAACP v. Secretary of HUD*, 817 F.2d at 152.

<sup>18</sup> If there were a private cause of action available, the defendants would be private parties like ACCA or its members, whom the Unions would sue directly under the PES to enjoin their operations. See *American Postal Workers Union v. React Postal Serv., Inc.*, 771 F.2d 1375 (10th Cir. 1985) (finding a private cause of action

In sum, this action can clearly be brought using common law review principles as they have developed up until the present, even if the APA is found to be inapplicable.

#### **D. The Government Has Waived The Defense That The APA Is Inapplicable**

As noted above, the Postal Service never argued in the lower courts that its purported exemption from the APA under section 410(a) precluded judicial review.<sup>19</sup> Similarly, this question was not presented in ACCA's petition for writ of *certiorari*. Accordingly, the government is precluded from raising this issue for the first time in this Court. See *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Duignan v. United States*, 274 U.S. 195, 200 (1927); and Supreme Court Rule 14.1 (barring con-

under the PES). Accord *National Ass'n of Letter Carriers v. Independent Postal Systems of America, Inc.*, 470 F.2d 265 (10th Cir. 1972); contra *American Postal Workers Union, Detroit Local v. Independent Postal Systems of America, Inc.*, 481 F.2d 90 (6th Cir. 1973), *cert. dismissed*, 415 U.S. 901 (1974).

<sup>19</sup> The government asserts that the unions' complaint "did not in fact rely upon the APA as a basis for their claim." (USPS Br. at 10). This simply is not true. Paragraph 19 of the complaint specifically alleged, as one of the Unions' "claims for relief", that "[t]he defendants actions, as described above, were: a) arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law; in excess of statutory jurisdiction, authority or limitations; and unwarranted by the facts within the meaning of 5 U.S.C. § 706". J.A. 110 (emphasis added). The complaint also alleged: "[W]hile the USPS is generally exempt from the provisions of the [APA] . . . it voluntarily follows APA procedures." J.A. 109. From our point of view—one in which the court of appeals concurred—it did not matter whether the APA supplied the applicable legal standard directly or through 39 C.F.R. 310.7 (adopting APA procedures); under either theory, the Postal Service failed to comply with the applicable APA standard. In any event, the adequacy of the complaint is not at issue. The government acknowledges that all parties "assumed that the APA applied to this case" (USPS Br. at 9 n.4) so that this case was litigated and decided as an APA case.

sideration of issues not presented, or fairly included, in the *certiorari* petition).

The government seeks to justify raising section 410 for the first time before this Court on the ground that its claim involves "congressional preclusion of judicial review" which is asserted to be "in effect jurisdictional." (USPS Br. at 9 n.4, citing *Block v. Community Nutrition Institute*, 467 U.S. at 353 n.4). This assertion is erroneous.

Section 410, at most, exempts the Postal Service from the APA. The judicial review provisions of the APA are not jurisdictional. *Califano v. Sanders*, 430 U.S. 99, 107 (1977); *Local 542, Int'l Union of Operating Eng'rs v. NLRB*, 328 F.2d 850, 854 (3d Cir. 1964), *cert. denied*, 379 U.S. 626 (1964); see also *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979); *General Inv. Co. v. New York Central R. Co.*, 271 U.S. 228, 230 (1926); *Bell v. Hood*, 327 U.S. 678, 682 (1946).

Since the APA is not jurisdictional, a defense based on exemption from the APA can be waived by the Postal Service. *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1013 (11th Cir. 1982); *Powers v. Alabama Dep't of Educ.*, 854 F.2d 1285, 1296-97 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 3158 (1989). See also *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) ("[t]he question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided."); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279, 281 (1977) (The defendant below had "failed to preserve the issue whether [the] complaint stated a claim upon which relief could be granted," and the Court was not required to resolve the issue because it was "not of the jurisdictional sort."); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 71 (1978).

Thus, since the APA exemption question is not jurisdictional, and because the Postal Service failed to preserve the issue below, the Court should conduct its review

of the questions presented in the *certiorari* petition—application of the zone of interest test and the merits—based on the assumption that the APA is applicable.

## II. THE UNIONS HAVE STANDING

### A. Postal Employees Are Within The Zone Of Interests Of The PRA

#### 1. The test as explicated in *Clarke*

The court of appeals concluded (891 F.2d at 308)—and neither the government nor ACCA contests the conclusion—that the Unions meet the injury in fact requirement of Article III. The only standing issue in this case is whether the Unions' interest in protecting the employment opportunities of their members meets the "zone of interest" test. That test, as stated in this Court's most recent opinion focusing on this standing question, is whether "the interest sought to be protected by the complainant [is] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395 (1982), quoting *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970).<sup>20</sup>

<sup>20</sup> The zone of interest test was first articulated in *Data Processing*. It was, however, implicit in earlier cases, such as *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), with which the test is compared, and which is said to have been based on the necessity of a litigant to demonstrate a "legal interest" in the statute. See *Clarke*, 479 U.S. at 394. *Tennessee Electric* was a suit by competitors of the TVA to enjoin its operations as unconstitutional under the Fifth, Ninth, and Tenth Amendments. Because the company was alleging an unconstitutional deprivation of property under the Fifth Amendment, the Court required it to prove the existence of a property right to be free from competition, which, of course, it could not. 306 U.S. at 138. For example, the Court rejected the proposition that "the franchise to be a public utility corporation and to function as such, with incidental powers, is a species of property which is directly taken or injured by the Authority's competition." *Id.* at 138. As to the

It bears special emphasis that the answer to this question is *statute-specific*: "at bottom, the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke*, 479 U.S. at 400. To be sure, in canvassing the statutory materials, the starting point is that Congress "inten[ds] to make agency action presumptively reviewable." *Id.* at 399. That being so, "[t]he test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would be plaintiff." *Id.* at 399-400.<sup>21</sup>

Given the arguments made by ACCA and the government here, it is also critical to note that the inquiry concerns the entire statute, not just the particular section alleged to have been violated. As the Court stressed in *Clarke*, "we are not limited to considering the statute which respondents sued, but may consider any provision which helps us understand Congress' overall purposes in the National Bank Act." *Id.* at 401. The critical point here, as the *Clark* Court put it is this:

In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a

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Ninth and Tenth Amendment claims, the Court held that only the states themselves could assert these rights. *Id.* at 144. This is but another way of saying that state-chartered public utilities were not within the zone of interests protected by the Ninth and Tenth Amendments. Thus, it is evident that the *Data Processing* Court was referring to the Fifth Amendment claim made in *Tennessee Electric* when it said that "[t]he 'legal interest' test goes to the merits." 397 U.S. at 153. This is because the legal interest test required the utilities to prove that they possessed a property right which was violated by the TVA even to raise the question whether they were deprived of their property without the due process of law.

<sup>21</sup> Earlier, we noted that *Peoples Gas*, 658 F.2d at 1191, held that Postal Service regulations were reviewable. We note, however, that the Court of Appeals for the Seventh Circuit disapproved the standing aspects of *Peoples Gas* as too "restrictive" in light of *Clarke*. *City of Milwaukee v. Block*, 823 F.2d 1158, 1165 (7th Cir. 1987).

right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. [*Id.* at 399.]

We recognize that on this critical point both the government and ACCA invoke *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990). *Lujan* is cited in support of their argument that, to demonstrate their standing, the Unions have the burden of showing that they are within the zone of interests protected by section 601 of the PRA—the section the Postal Service is alleged to have violated—and not within the PRA's overall zone of interests. USPS Br. at 18, ACCA Br. at 17. That argument is doubly flawed. *Lujan* turned on the entirely separate issue not even contested here of whether the appellees were injured by the Secretary's failure to comply with certain environmental statutes, not whether their interests were comprehended within the zone of interests protected by those statutes generally.

Nonetheless in their zone of interests argument, the government and ACCA cite the emphasized part of the following passage from *Lujan*:

We have long since rejected that interpretation . . . which would have made the judicial review provision of the APA no more than a restatement of pre-existing law. Rather, we have said that to be "adversely affected or aggrieved . . . within the meaning" of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the zone of interests" sought to be protected by the statutory provision *whose violation forms the legal basis for his complaint*. See *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 396-397 (1987). [110 S.Ct. at 3186 (concluding emphasis added).]

As we have already noted, the *Clarke* Court said plainly that, in the zone of interests analysis, the Court was "not

limited to the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act" at issue there. 479 U.S. at 401. And the foregoing quotation from *Lujan* makes it plain that the Court merely intended to give a shorthand description of the *Clarke* holding and did not overturn any aspect of *Clarke*. Given that point, the government's and ACCA's "argument focuses too narrowly on [PRA section 601], and does not adequately place [§ 601] in the overall context of the [PRA]." *Clarke*, 419 U.S. at 401.<sup>22</sup>

With these principles in mind, we turn to an analysis of the PRA and its legislative history.

## 2. *The 1970 legislative consideration of the PRA and its special solicitude for postal employees and their unions*

The government's argument against Union standing rests on isolating the revenue-protective purposes of the PES from the overall Postal Reorganization Act, of which Section 601 is a part. USPS Br. 14-16. "But this argument is not faithful to the actual history." *Clarke*, 479 U.S. at 416 (Stevens, J., concurring). As the court of appeals below observed:

[T]o assess whether the Unions fall within the zone of interests of the PES we need not create nice distinctions between the PES and the PRA where Congress itself did not . . .

<sup>22</sup> The USPS's and ACCA's comparison of the postal unions' interest in protecting the revenue of the Postal Service with the interest of the court reporter in having "on the record hearings" in the example cited by the Court in *Lujan*, 110 S. Ct. at 3186, is without merit. USPS Br. at 19-20, ACCA Br. at 19. While we have no reason to dispute the proposition Congress would most likely not consider the benefit to court reporters when enacting statutory provisions granting hearing rights and would certainly not rely on court reporters to enforce such hearing rights, in the next section we demonstrate clearly that Congress did consider the benefits of its actions to postal employees when enacting the PRA.

Unions asserted interest is embraced directly by the labor reform provisions of the PRA. The PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service. The interplay between the PES and the entire PRA persuades us that there is an "arguable" or "plausible" relationship between the purposes of the PES and the interests of the Union. [891 F.2d at 310.]

The PRA embodies congressional consideration of every aspect of postal organization and functioning. By the 1960's, the Post Office had deteriorated to a disastrous extent. See H. Rep. at 4-5; S. Rep. at 3. On April 8, 1967, the President created a Commission on Postal Organization, which came to be known as the Kappel Commission. In July 1968, the Commission submitted a report entitled "Toward Postal Excellence". The report found that "[t]he United States Post Office faces a crisis." *Id.* at 1. The report highlighted several categories of severe problems including "the circumstances of postal employment," *id.* at 14-16, and criticized "unproductive labor-management relations" between postal unions and supervisors. *Id.* at 18-22. The Commission recommended establishment of a government-owned corporation. The aim of such a corporation would be "the introduction of modern management practices" which would result in "not only greatly improved mail service, but the early elimination of the postal deficit, and . . . better career opportunities, and working conditions for the individual postal employee." *Id.* at iii.

The critical event leading to enactment to the PRA was the nationwide work stoppage by postal employees in March 1970.<sup>23</sup> See H. Rep. at 3. Congress recognized

<sup>23</sup> Prior to the strike, the need for reform in the Post Office was recognized by Congress to be a matter of great urgency. Hearings on postal reorganization were held in both houses throughout 1969. Members and witnesses warned of growing frustration among postal workers over pay and working conditions which could result in an

that this strike was the result of "legitimate grievances that had contributed to the cumulative frustration among postal employees . . . . Although it is one of the Nation's largest employers, the Post Office has an unsatisfactory record of labor-management relations. Career prospects are bleak, working conditions are frequently primitive, and morale is unacceptably low." H. Rep. at 3-4.

Although several bills to reform the Post Office had been introduced, the work stoppage "had the effect of crystallizing heretofore opposing and conflicting conferences in support of a new compromise postal reform proposal." H. Rep. at 3. Indeed, that compromise proposal, which became the PRA, was itself a product of negotiations between postal unions and the Nixon Administration. The Message from the President, dated April 16, 1970, explains that the Administration's bill<sup>24</sup> was "jointly sponsor[ed]" by the Post Office Department and the postal unions, pursuant to the strike settlement agreement. H.R. Doc. No. 313, 91st Cong., 2nd Sess. 1, *reprinted in* H. Rep. at 51. The memorandum of agreement between the Post Office Department and the postal unions expressly stated that "the parties have *jointly developed, through the collective bargaining process*, proposed legislation which provides for a major reorganization of the Post Office Department." H. Rep. at 57 (emphasis added).<sup>25</sup>

illegal strike. See Postal Labor Relations and Employee Morale: Hearings Before the Subcomm. on Postal Operations and Civil Service, House of Representatives, 91st Cong., 1st Sess. 1, 65, 75, 98 (1969); Postal Modernization: Hearings Before the Senate Comm. on Post Office and Civil Service, 91st Cong., 1st Sess. 782-83 (1969).

<sup>24</sup> The Administration's bill became S. 3842 and H.R. 17070. Although amended in committee, the reported bills embodied "a substantial number of the Administration's recommendations." S. Rep. at 1. See H. Rep. at 1-2 (purpose of H.R. 17070 was to carry out the President's Message of April 16, 1970).

<sup>25</sup> The agreement also promised amnesty for all strikers. *Id.* at 58.

President Nixon's message stated:

In the agreement, the Post Office Department and the postal employee organizations affiliated with the AFL-CIO undertook to negotiate and jointly sponsor a postal reorganization and pay bill to be recommended to the Congress as a measure that could ultimately lead to a cure of the problems that have been festering for years in the postal system.

The negotiations . . . have now culminated in agreement on a legislative proposal that would:

—Convert the Post Office Department into an independent establishment in the Executive Branch of the Government freed from direct political pressures and endowed with the means of building a truly superior mail service.

—Provide a framework within which postal employees in all parts of the country can bargain collectively with postal management over pay and working conditions.

—Increase the pay of postal employees by 8 percent, over and above the Government-wide increase of 6 percent, and shorten the time required to reach the top pay step for most postal jobs. [*Id.* at 51.]

The proposed law was specifically intended "to allow postal workers to share the benefits of the increases in efficiency and productivity that should be attainable under a properly reorganized postal system." *Id.* at 54. The President recognized the obvious fact that attainment of the service objectives of the postal laws was inseparable from consideration of the welfare of postal employees. He said:

The Congress is now presented with an opportunity to pass legislation that will bring a new measure of fairness to postal employees, a new efficiency to the system itself, and long overdue equity to the taxpayer.

Neither better pay nor better organization will, in and of itself, guarantee better mail service.

Laws do not move the mail, nor do dollars. What moves the mail is people—people who have the will to excel, the will to do their work to the very best of their ability.

Enactment of the legislation that I now propose would give our postal employees the means to attain a goal they have never before had the means of attaining—the goal of building, in America, the best postal system in the world.

That is a goal worth striving for. With this postal reform legislation, it is a goal that can be achieved. I hope that Congress will lose no time in enacting the laws that are needed to let our postal people get on with the job. [*Id.* at 56.]

An enormous amount of preliminary work and debate had already been done by Congress before these bills were introduced. "The provisions of S. 3842 result from one of the longest and most intensive studies in the committee's history." S. Rep. at 1. The House Report stated: "Rarely has any subject received as much careful and intensive consideration by a committee of the Congress as this committee has given to the very complex and important subject of postal reform . . . ." H. Rep. at 2-3. The House Report summarized the statutory goals:

When enacted, H.R. 17070 will totally reform the Nation's postal system so as to—

Enable the postal service to continue to provide—and extend and improve upon—the present quality and scope of postal service in the face of the tremendous increases of mail volume that are expected in the future;

Eliminate serious handicaps that are now imposed on the postal service by certain legislative, budgetary, financial, and personnel policies that are outmoded, unnecessary, and inconsistent

with the modern management and business practices that must be available if the American public is to enjoy efficient and economical postal service;

Modernize limitations on the authority of the postal service to procure transportation for mail so as to permit the most expeditious and economic movement of the mails, and thus facilitate more rapid and less expensive delivery, enable more economic utilization of the Nation's transportation resources, and encourage more responsive and imaginative development of new transportation facilities;

Create a lasting foundation for a modern, dynamic, and viable postal institution that is both equipped and empowered at all times to satisfy the postal requirements of the future technological, economic, cultural, and social growth of the Nation;

Provide postal employees with decent and modern working environments and with the facilities and modern equipment that they need in order to realize their full productive potential;

Improve postal employee-management relations, to recognize by law—that postal employees have the right freely to select collective bargaining representatives of their own choosing, and to give postal employees a voice in determining their conditions of employment and a real stake in the quality of the postal service that they provide to the public; and

Adjust the salaries of postal employees so as to compensate for the limited opportunities of career advancement that most postal workers have traditionally faced and to allow postal workers to share benefits of the improved efficiency and productivity that should be attainable under a properly organized postal system. [*Id.* at 2.]

The Senate Committee called the Act a "complete break with the past." S. Rep. at 2. See also 116 Cong. Rec.

27,604 (1970) (statement of Rep. Udall) ("[W]e are truly making a historic charge here today. A fundamental structure of American Government is abolished and a new Postal Service will take its place.").

Congress' recognition of the interests of postal employees is found throughout the PRA. The labor reforms of the PRA were among the essential means of achieving an efficient postal service. The Act specifically states as a postal policy that employees must be paid wages comparable to those in the private sector, and in particular mandates that the Service "place particular emphasis upon opportunities for career advancement of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States." 39 U.S.C. 101(c). Postal facilities were to be designed "to create desirable working conditions for its officers and employees." 39 U.S.C. 101(g). Representatives of employees, nominated by their unions, were given four (of 11) seats on the Postal Advisory Council, which the Service was required to consult with and receive advice from on "all aspects of postal operations." 39 U.S.C. 206. Chapter 10 established comprehensive, progressive employment policies, including maintenance of existing minimum standards. 39 U.S.C. 1005(f). Chapter 12 enacted a regime of collective bargaining based on the private sector model. Section 8 of the uncodified act preserved jobs of postal workers by transferring them to the Postal Service; section 9 legislated an 8% pay raise for all employees; section 10 required the negotiation of collective bargaining agreements meeting minimum standards; and section 13 directed immediate implementation of a merit system. PRA §§ 8-10, 13, 84 Stat. 783-786.<sup>26</sup>

<sup>26</sup> Indeed, employment issues dominated the debates over the bills which culminated in the PRA. See, e.g., 116 Cong. Rec. 19,837-839; 20,200-241; 20,328-331; 20,432-501; 22,279-346; 23,525-528; 26,953-959 and 26,962-966 (1970).

But beyond those provisions dealing directly with labor issues, it was understood during the legislative process leading to enactment of the PRA that postal employees' interests—and thus the interests of the postal unions—were implicated in every aspect of the legislation. The agreement between the postal unions and the Nixon Administration "called for the parties to agree upon and jointly sponsor legislation designed to restructure the existing Post Office Department so that it might operate on a self-contained basis." H. Rep. at 3. Then-Postmaster General Winton M. Blount gave the following response to a question raised as to why postal unions had an interest in all aspects of the bill including the transportation provisions:

Mr. Corbett: Mr. Chairman, in that connection I am wondering why the postal unions or associations care about this particular section of the bill. Is there any reason for them to have concern about how you handle your transportation?

Mr. Blount: Mr. Corbett, both the postal unions and the Department have made it very clear that what they were doing was recommending to the Congress a complete postal reorganization measure. This recommendation involved the entire bill. We did discuss and talk about all the legislation. And certainly the employees of the Department are extremely interested in the manner in which we are able to handle our business, because they want to provide the best service to the American public that they can.

So our negotiations were in the matter of a recommendation to the Congress, and that recommendation included an entire legislative package.

*Hearings Before the Committee on Post Office and Civil Service, House of Representatives, 91st Cong., 2d Sess. 35 (1970).*

For precisely these reasons, the PES cannot be viewed as somehow distinct from the "entire legislative pack-

age."—The fact that the PES were reenacted as part of the PRA without substantial modification (see USPS Br. at 19) does not mean that the PES were not integral parts of the overall legislative enactment. The PES were reenacted only after Congress had given specific consideration to the need to maintain the Postal Service as a monopoly under the reorganization.<sup>27</sup> The PES were critical to the monopoly structure of the Postal Service, which was the "lasting foundation" upon which the reorganization was built. H. Rep. at 2; see Governors' Report at 6, 93. Indeed, because the PRA required the Postal Service, which had been heavily subsidized, to become financially self-sufficient, 39 U.S.C. 3621, see *Greeting Card Publishers*, 462 U.S. 813; *Regents*, 485 U.S. at 594, the PES became even more important to the finan-

<sup>27</sup> The Kappel Commission recommended retention of the PES, "although not necessarily in its present form" where they "do not seem to be adapted to the reality of modern communications." *Towards Postal Excellence* at 129. See *id.* Annex, vol. II, p. 6-5. Along with the rest of the PRA, "Congress concerned itself in detail with the Postal monopoly." PRC Order No. 133, at 17. See 116 Cong. Rec. 27596 (1970) (statement of Rep. Dulski). Before including language of the old PES in the PRA during the 1970 floor debate, Congress considered and rejected an amendment offered by Representative Crane during the 1970 floor debate that would have eliminated the PES. See *id.* at 9,516-517 (1976) (statement of Rep. Crane). Representative Udall spoke in opposition to the amendment, specifically noting the problem of cream-skimming. 116 Cong. Rec. 20479 (1970). See also *id.* at 26,954 (1970) (statement of Sen. McGee) *id.* at 26,954 (1970) (statement of Sen. Fong). In section 7 of the PRA, Congress ordered the Board of Governors to study whether to continue the PES in their current form and to report its findings within two years. Pub. L. 91-375, § 7, 84 Stat. 783. The Governors' Report concluded that the PES should be continued but not expanded, and that they should be administered in a systematic way through a rulemaking process. Governors' Report at 9-14. The Board of Governors also claimed the right under section 601 to suspend the PES when the public interest required it. *Id.* at 11. After the report issued, Congress held hearings on it. No statutory modifications resulted, and the monopoly stood as reenacted in the PRA.

cial viability of the new system. Governors' Report at 6-7. Obviously, then, failure properly to enforce the PES could, as a practical matter, deprive the postal unions of the essence of their legislative bargain.<sup>28</sup>

Thus, unlike the banking laws considered in *Clarke*, the PRA is a single, unified statute which was enacted in its entirety at a single time. The PES were an integral part of that legislative package. And the Congress that enacted the PRA recognized that the postal unions' interests were bound up with every aspect of the PRA. In these circumstances, the court of appeals' finding of union standing is completely faithful to the overall "legislative spirit" of the PRA. *Clarke*, 479 U.S. at 414 (Stevens, J., concurring).

Far from being inconsistent with the objectives of the PRA (USPS Br. at 17), recognition of union standing here would simply permit a party, whose interests Congress recognized, to sue to vindicate norms established in the statute.<sup>29</sup> And those norms reflect interests that the PRA was designed to advance: the interests of preservation of the financial base of the Postal Service and protection of the employment opportunities of postal employees. The postal unions in this case are at the core of

<sup>28</sup> The memorandum of agreement specifically provided for the Postal Service "to generally be self-supporting by January 1, 1978." H. Rep. at 58.

<sup>29</sup> The government argues that the Unions' interest are incompatible with those of the PES because they always have an interest in challenging suspensions of the PES, even where the public interest requires it. USPS Br. at 17. However, nothing in *Clarke* suggests that an incentive to sue is a reason to deny standing. The Unions' incentive to sue is no different from bank competitors' incentive to sue whenever the Comptroller of the Currency permits national banks to expand their business in ways that threaten their profits through increased competition. In any event, the historical truth is that the Unions have not challenged other suspensions.

the "zone of interests" sought to be protected by the PRA.<sup>30</sup>

### B. Postal Employees Have Standing Under Non-APA Standards

We have shown, *supra* at 19, that if the agency action here were not reviewable under the APA, it would be

<sup>30</sup> The Postal Service is wide of the mark in suggesting that according the unions standing in this case would somehow lead to suits by employees against agencies whenever employees believe that "daily . . . decisions" threaten their employment opportunities. USPS Br. at 20. This case, of course, does not involve such daily personnel actions; this case deals with judicial review of an agency's final rule. From all that has been shown in the foregoing text—*viz.*, "the special emphasis which the PRA placed on the welfare of postal employees and the unique role of the PES in maintaining the financial viability of the Postal Service," 891 F.2d at 311—the Unions' interests clearly are *not* "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399.

And the court of appeals directly addressed the government's worry about opening a floodgate of litigation:

The Postal Service . . . is charged with the responsibility of preventing unwarranted dissipation of an historic postal monopoly. Congress has imposed an obligation, largely congruent with the interests of postal employees, that is much stronger than those embodied in most statutory schemes under which disgruntled agency employees might sue. [*Id.*]

In this regard, the court of appeals was careful to distinguish the kind of case as to which the Postal Service brief expresses concern: *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038, *reh. denied*, 892 F.2d 98 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 3214 (1990), which denied standing to a federal employee union which challenged a decision to contract out work to private firms. The *Cheney* court held that the statutes there at issue did not provide standing to the union. Those statutes were intended to foster the contracting out of government work to private firms. *Id.* at 1050. This contrasts with the PES, which legislate *against* competition, and with the PRA, which recognizes the interests of postal employees—interests which are congruent with the PES's purposes. 891 F.2d at 311.

reviewable under common law principles. As we now show, the postal unions would have standing in the event that such non-APA review were found to govern this case.

In *Clarke* the Court withheld judgment on the question whether "the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the 'generous review provisions' of the APA apply." 479 U.S. at 400 n.16.<sup>31</sup> The Court compared the zone test with the standards governing implied causes of action, which established a "threshold burden" on a plaintiff of showing that the plaintiff is "one of the class for whose *especial* benefit the statute was enacted." *Id.*, quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975) (emphasis in original). Whatever test might apply in the range from "zone of interests" to "especial benefit," the Unions here would have standing.

We have already shown at length that the Unions here meet the "zone of interests" test. *See supra* at 27-40. That same showing would also meet the requirements of the "especial benefit" standard. As the President of the United States stated, the Unions here negotiated and "co-sponsored" the PRA as part of the resolution of a nationwide labor dispute. *See supra* at 31-34. The agreement provided for "restructur[ing]" that would allow the Postal Service to "operate on a self-contained basis." Congress

<sup>31</sup> The zone test has been cited in both APA and non-APA cases. *Data Processing*, for example, expressly stated that the test applied to "constitutional guarantees." 397 U.S. at 153. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320-321, n.3 (1977) (applying the test to the Commerce Clause); *Tennessee Electric*, 306 U.S. at 144 (implicitly holding that utilities were not within the zone of interests of the Ninth and Tenth Amendments); *see also Valley Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 n.6 (1978); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976), where the test was mentioned.

was expressly informed by the Postmaster General that the postal unions had an interest in every part of the legislative package that constituted the PRA. And the PES were an integral part of that package. Due recognition of the process that produced the PRA requires that the Unions be recognized as "one of the class for whose *especial* benefit the statute was enacted."

### III. THE COURT OF APPEALS CORRECTLY OVERTURNED THE INTERNATIONAL REMAIL SUSPENSION

PRA section 601(b) permits the Postal Service to suspend its monopoly if—but *only* if—"the public interest *requires*" such suspension (emphasis added). The court of appeals found that the suspension of the PES for international remailing was inconsistent with this public interest standard because the suspension was intended solely to benefit "a single segment of the Service's consuming public: businesses engaged in commerce overseas." 891 F.2d at 313. That court also concluded that the Postal Service had acted unreasonably in that the Service failed to consider "the impact of the proposed suspension on those customers who would continue to use the Postal Service, both from a price and service perspective." *Id.* Both these conclusions are correct and should now be affirmed.<sup>32</sup>

#### A. The Suspension Was Inconsistent With the Public Intent Standard Provided by Section 601(b)

The public interest standard set forth in section 601(b) is not an open-ended grant of discretion.<sup>33</sup> "[T]he use

<sup>32</sup> In addition, the court's conclusion that the USPS acted arbitrarily and capriciously by failing to explain its reasons for rejecting "more narrowly, defined suspension alternatives," 891 F.2d at 314, citing *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983), should also be affirmed.

<sup>33</sup> The government argues that section 601(b) does not define the term 'public interest', and it entrusts the public interest deter-

of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 669 (1976).

The most authoritative statement of the purposes of the PES, in the context of the PRA, is the 1973 Governors' Report. The Report stressed that the postal monopoly is necessary to meet the PRA's goal of making the Postal Service "self-sufficient . . . in the face of cream-skimming competition against its major product" and therefore, strongly recommended that the monopoly be retained and that any exceptions to the monopoly be narrowly drawn. Governors' Report at 6. The Report further emphasized that suspension of the monopoly to aid "some members of the business community" would ultimately have a negative impact on the "larger business and general public community":

Relaxation could well serve some members of the business community whose primary financial interests are tied to letter mail. It would ill serve members of a larger business and general public community

mination to the judgment of the Postal Service. (USPS Br. at 28). However, this attempt to characterize section 601(b) as a broad grant of discretion ignores the fact that where Congress did choose to confer regulatory discretion on the Postal Service it used distinctly different statutory language. Section 401 of the PRA provides the USPS with the necessary powers to effectuate the purposes of the PRA, among them the power "to adopt, amend, and repeal such rules and regulations *as it deems necessary* to accomplish the objectives of this title." 39 U.S.C. 401(2) (emphasis added). No comparable language exists in section 601. The Postal Service's claim of broad discretion to suspend the PES would in effect substitute the rule-making language of section 401(2) for the significantly more narrow language used in section 601(b), and, thus, read the latter provision out of the Act. See also 39 U.S.C. 5001 (providing for temporary transportation arrangements "when, *as determined by the Postal Service*, an emergency arises") (emphasis added).

who depend on the Postal Service to serve all their mail needs.

Relaxation would also impose genuine hardships upon those people who live in thinly populated or low income areas, areas which private carriers might not serve and in which Postal Service capabilities would inevitably decline. [*Id.* at 9.]

When the Postal Service promulgated the urgent letter suspension, 39 C.F.R. 320.6, the Postal Service itself recognized that selective cost savings for individual mailers do not represent a legitimate justification for a suspension of the Private Express Statutes. The Postal Service's rationale for including a requirement that the cost of private carriers be higher than that of the Postal Service to qualify for the urgent letter suspension was to protect against having low cost cream-skimming competitors undermine the postal system and "effectively nullif[y]" the Private Express Statutes. As the Service stated in its Federal Register notice of proposed rule-making:

The test we have suggested is greater of three dollars or twice the applicable U.S. postage for first-class mail. *This is designed to protect the postal system against the inroads of "cream-skimming" by private couriers solely on the basis of their ability to undercut postal rates selectively.* It is intended to test whether the shipper looks to a private carrier because he genuinely attaches an importance to prompt delivery, or simply because he desires to reduce shipping costs selectively. *If selective cost savings were sufficient grounds to use a private courier to carry letters, the Private Express Statutes would be effectively nullified.*

44 Fed. Reg. 40,076 (1979) (emphasis added).

The Postal Service simply ignored the foregoing reasoning during the rule-making proceedings below, and

instead relied on comments that international remailers could provide lower cost service. See comments cited in USPS Br. at 32, n.14. However, the lower costs supposedly offered by the international remailers do not represent a benefit to the *overall mailing public*. Rather, the public ultimately must absorb, through higher postal rates, the net revenue loss to the Postal Service because of a suspension designed to benefit only a relatively small number of firms who mail to international destinations.<sup>34</sup>

The argument offered in response to the foregoing by the government and ACCA is that the private couriers offer international mailers service that is faster, more flexible and more reliable, thus enhancing American competitiveness overseas. The fatal flaw in this argument—even assuming, *arguendo*, that private couriers are faster, more flexible, and more reliable than the Postal Service—is that prior to the international remail suspension, international mailers *already* had access to private couriers through the urgent letter exemption. The *only* real consequence of the remailing suspension was to release international remailers from the time and cost requirements of the urgent letter rule which remain applicable to all other mailers who wish to utilize private couriers. The record is devoid of any facts that justify according international remailers such favored treatment.

In sum, the international remail suspension cannot be characterized as satisfying the public interest standard of section 601(b).

<sup>34</sup> As was demonstrated by the declaration of economist Dr. Jack Rutner that was submitted below, J.A. 140-141, the Postal Service's own data show that the Service has suffered a net loss of revenue due to skimming of mail volume by international remailers.

### B. The Postal Service Failed to Consider the Impact of Revenue Loss Caused By the Suspension

In *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. at 43, the Court observed that a regulation promulgated by an administrative agency will be overturned as arbitrary and capricious, *inter alia*, "if the agency has relied on factors which Congress has not intended it to consider [or] entirely failed to consider an important aspect of the problem". Here, the Postal Service not only relied on an inappropriate factor (selective cost savings to businesses who mail abroad) but failed to consider a crucial aspect of any private express issue—the impact of the loss of revenue necessarily resulting from a suspension of the monopoly.

It is undisputed that the Postal Service was never able to forecast the revenue that would be lost due to the international remail suspension. Instead, the Service simply asserted that even if the amount would be diverted was equal to the total amount of revenue from international mail—\$882.3 million or 3.2% of total postal revenue—such loss would not outweigh the perceived benefits to the public interest. USPS Br. at 35. But, as the court of appeals correctly concluded, the Postal Service never attempted to assess the impact on postal rates and services that would result from an \$882.3 million loss of revenue. Since the Postal Service is required by statute to be economically self-sufficient, 39 U.S.C. 3621, these losses will ultimately have to be charged back to the overall mailing public in the form of higher postal rates, or, conceivably, reduced service. Having failed to give *any* consideration of these questions, the Postal Service cannot be said to have reasonably evaluated "the public interest" as required by section 601(b).<sup>35</sup>

<sup>35</sup> The Postal Service has not always been so cavalier about the loss of revenue caused by suspensions of the Private Express Stat-

### CONCLUSION

The judgment of the court of appeals should be affirmed.

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utes. In a rule-making proceeding in 1973-74 which resulted in a revision of its private express regulations, the Postal Service considered a suspension for intra-company materials. It ultimately abandoned this proposal in part because:

[F]inancial conditions in the Postal Service today require that the most careful consideration be given to any proposal that might curtail postal revenues, particularly if the curtailment could be large and its control difficult. For these principal reasons, we have concluded that the Postal Service should not exercise its discretion to suspend the Private Express Statutes as to intra-company letters.

39 Fed. Reg. 33,211 (1974).

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No. 89-1416

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

AIR COURIER CONFERENCE OF AMERICA,  
*Petitioner,*  
v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO,  
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,  
and UNITED STATES POSTAL SERVICE,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

MOTION OF RESPONDENTS  
AMERICAN POSTAL WORKERS UNION, AFL-CIO, AND  
NATIONAL ASSOCIATION OF LETTER CARRIERS,  
AFL-CIO, FOR LEAVE TO FILE A REPLY BRIEF,  
AND REPLY BRIEF

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**MOTION OF RESPONDENTS  
AMERICAN POSTAL WORKERS UNION, AFL-CIO, AND  
NATIONAL ASSOCIATION OF LETTER CARRIERS,  
AFL-CIO, FOR LEAVE TO FILE A REPLY BRIEF**

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Respondents American Postal Workers Union, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, have filed a motion to dismiss the writ of *certiorari* for lack of jurisdiction. The petitioner and federal respondent have filed briefs in opposition. Rule 21 of the Court does not expressly provide for reply briefs. The Union respondents respectfully request leave to file this reply brief, to answer points advanced in the briefs in opposition which were not addressed in our motion, par-

particularly the applicability of *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297 (1983).

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## REPLY BRIEF

In our motion to dismiss we showed that, as in *Diamond v. Charles*, 476 U.S. 54, 63-64 (1986), the Postal Service's "failure to invoke [the Court's] jurisdiction leaves the Court without a 'case' or 'controversy' between the [Unions] and the [Postal Service]." ACCA and the Postal Service respond by insisting that ACCA has standing to complain to this Court over the court of appeals' remand order. None of their supporting arguments have merit.

1. The government, in its effort to distinguish *Diamond v. Charles*, asserts that the key difference between these cases is that Dr. Diamond was attempting to preserve state criminal sanctions against physicians who perform abortions, while ACCA is here "seeking to uphold a regulation lifting the criminal sanctions otherwise applicable to the conduct of its members by creating an exception to the scope of a criminal law." USPS Br. at 4.

The first problem with this argument is that there is no reason to believe that ACCA's members' current activities are in violation of the criminal law. The Justice Department itself has taken the opposite view. Putting that aside, the government's argument fails to appreciate that ACCA's interest in the regulation does not substitute for the requirement of showing that ACCA is threatened with immediate injury, which would permit the association to petition. See also ACCA Br. at 9-10. Although ACCA might feel more apprehensive of prosecution under the "urgent letter" rule without the new remail rule, apprehension alone has never sufficed for standing. See *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.7 (1983) ("It is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions" (emphasis in original)).

2. The government and ACCA rely on *Director, Office of Workers' Compensation Programs v. Perini North*

*River Associates*, 459 U.S. 297 (1973), for the proposition that each party below may petition the Court. USPS Br. at 2, ACCA Br. at 5. On this point *Diamond*, a decision issued after *Perini*, and a decision which squarely addresses the issue of appellant-intervenor standing, controls this case. *Diamond* holds that mere party status does not suffice; that case expressly specifies that a petitioner must establish the existence of a case or controversy, and "cannot ride 'piggyback' on the [government's] undoubted standing . . ." when the government fails to petition. 476 U.S. at 64.<sup>1</sup> *Diamond* thus decided a standing issue that had not been definitively resolved by the Court in *Perini* (459 U.S. at 305).

3. If, contrary to our belief, the foregoing does not suffice, it is our submission that *Perini* is, in any event, distinguishable. First, the concept of "injury" is not applicable to a governmental body's inherent right to litigate the correct interpretation of the laws it is commissioned to administer. Governmental agents and agencies hardly ever suffer injury in the same sense that private litigants who are adversely affected by agency action do. In this critical respect, governmental litigants differ from private citizens who have no right to sue simply to see to it that the law, properly interpreted, is obeyed. See *Diamond*, 467 U.S. at 66; cf. *United States v. Federal Deposit Ins. Corp.*, 881 F.2d 207, 209 (5th Cir. 1989), cert. denied, 110 S.Ct. 1118 (1990). Viewed in this light, the Director of OWCP in *Perini* had standing to challenge the court of appeals erroneous construction of the Longshoremen's and Harbor Workers' Compensation Act, even though a private party would not have standing.

Second, although couched as a "standing" question, *Perini*'s real contention was that section 21(c) of the Longshore Act, 33 U.S.C. 921(c), prevented OWCP

<sup>1</sup> The *Diamond* majority does not mention *Perini*.

(which administers the statute) from seeking Supreme Court review of a contrary decision of the Department of Labor's Benefits Review Board. See *Perini*, 459 U.S. at 302 n.9. In essence, *Perini* was contending that an agent of the Department of Labor was precluded from litigating legal issues already decided by an adjudicatory body within the same department. This claim has nothing to do with the standing issue presented in *Diamond*.

Finally, because *Perini* controverted the claim for compensation which the OWCP found was required under the statute, there clearly existed a case or controversy between the Director and *Perini* when the Director petitioned for *certiorari*. This is precisely the critical factor absent in ACCA's case, as we show directly below.

4. Contrary to ACCA's contention (ACCA Br. at 5), the association had no standing when it filed its petition for *certiorari* because it could not demonstrate the existence of a case or controversy involving any respondent at the time of its petition. The Postal Service had failed to petition, and ACCA had no power to continue this case on its own. ACCA was not then (and is not now) aggrieved by the Postal Service's final rule. The Unions' continuing disagreement with the Postal Service over whether the remail rule meets the section 601(b) "public interest requires" standard was (and is) a justiciable controversy, but *not* between ACCA and the Unions.<sup>2</sup>

This point is illustrated by the fact that ACCA could not have successfully maintained a declaratory judgment action against the Postal Service and the Unions over the

<sup>2</sup> Even this controversy did not come into existence until the government filed its brief on the merits as respondent in support of the petitioner. ACCA is therefore incorrect when it states that the case-or-controversy was preserved by the Postal Service's filing of its brief. ACCA Br. at 5. There needed to be a justiciable dispute at the time of the petition for the Court to possess jurisdiction. See *Diamond*, 476 U.S. at 62-64.

validity of the rule. ACCA has no dispute with the Postal Service; such a "friendly suit" would be dismissed forthwith. See 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3530 (2d ed. 1984). Furthermore, ACCA could not sue the Unions alone over the validity of the rule; such an action would be dismissed for failure to join the Postal Service. See 7 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1617 at 245 (2d ed. 1986) (government is an indispensable party when "judgment cannot be rendered without affecting [its] interest. . .").

The government speculates that ACCA could face a threat of injury by the possibility of a direct civil action by the Unions under the PES against ACCA members. USPS Br. at 6-7. This theoretical injury is *not* alleged by ACCA. ACCA Br. at 9-10.<sup>3</sup> Even had ACCA made this contention, this asserted "threat" could not sustain a declaratory judgment action, and cannot sustain a *certiorari* petition. The mere possibility that the Unions might sue ACCA's members does not amount to a present threat of concrete injury. See 10A C. Wright, A. Miller & M. Kane, *Federal Practice Procedure* § 2757 at 586-587 (even if arguably unlawful conduct occurs, standing absent when "the other party may not challenge it"); compare *id.* at 596-597 (cases justiciable when litigation is "imminent" or "inevitable").<sup>4</sup> A declaratory judgment

<sup>3</sup> ACCA expresses concern about being subject to searches and seizures by the Postal Inspection Service. *Id.* But all businesses are subject to such inspection. There is no reason to believe that the Inspection Service will harass ACCA's members with unwarranted inspections in light of the Justice Department's ruling that their operations are lawful. See *Los Angeles v. Lyons*, 461 U.S. at 102.

<sup>4</sup> Contrary to the government's contention (Br. at 6-7), ACCA has no reason to believe that the Unions will sue. This rank speculation takes no notice of the fact that the Unions did not sue ACCA's members prior to the adoption of the remail suspension or make any ACCA member a defendant in this case. ACCA itself does not assert that the association is specifically worried about Union suits. See ACCA Br. at 10.

action against the Unions on this basis would simply seek a declaration that ACCA has a meritorious defense in an action by the Unions (should the Unions ever bring one), and would therefore be precluded by the cases requiring a live, present controversy. *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990); see Unions' Motion at 11 and 15 n. 12, citing authorities.

ACCA's interests are "abstract," even within the analysis of the *Diamond* concurrence (476 U.S. at 75), because all its members' current operations have repeatedly been declared by the Department of Justice to be lawful. "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis*, 110 S.Ct. at 1253 (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). The only contrary argument—that prosecutors can change their minds (USPS Br. at 5)—does not convert this into a live controversy.<sup>5</sup> The cases make it clear that justiciability must be judged on *present* circumstances. See *Whitmore v. Arkansas*, 110 S.Ct. 1717, 1723 (1990) ("[I]njury must be concrete in both the qualitative and temporal sense.").

5. Because *Perini* rested entirely on the petitioner's concession that the Director was a proper respondent in the court of appeals,<sup>6</sup> see *Diamond*, 476 U.S. at 72 (O'Con-

<sup>5</sup> Noting that the Unions relied on "statements in the administrative record" (Br. at 5), the government implies that the Department of Justice's position that remail was lawful was not official policy. However, the position was certainly official; it was specifically quoted by the Postal Service itself as the reason for its proposed 1985 regulation to clarify the "urgent letter" rule. 51 Fed. Reg. 21,929 (June 17, 1986), J.A. 66-67. Likewise, ACCA's assertion that the Department's position could "vary based on the facts" (Br. at 12 n.8) is immaterial, given the obviously general terms of the Department's pronouncement that international remail operations were lawful under the "urgent letter" rule.

<sup>6</sup> Plaintiff Cunningham named the Director, the Benefits Review Board, *Perini* (the employer) and the employer's insurance company

nor, J., concurring); *Perini*, 459 U.S. at 304, it has little relevance to this case.<sup>7</sup> The Unions have made no such concession as to the appropriateness of the district court's order allowing ACCA's permissive intervention.<sup>8</sup> Although the Unions did not oppose ACCA's intervention, the issue may be raised now because "it bears on whether a justiciable controversy is presented in this Court." 476 U.S. at 74 (O'Connor, J., concurring). Thus ACCA's waiver argument and its reliance on Supreme Court Rule 15.1 are misplaced. ACCA Br. at 6-7.<sup>9</sup>

as respondents. The Longshore Act permits review of the final decision of the Board (see 33 U.S.C. 921(c)), and it was the Board's decision of which he was aggrieved, regardless of who the nominal respondents were.

<sup>7</sup> Even when tested against the standards for permissive intervention under Fed. R. Civ. P. 24(b)(2) standards—the applicability of which the *Diamond* Court left open (476 U.S. at 68 and n.21) and which neither the government nor ACCA argue must be considered here—ACCA was not a proper intervenor. A theoretical suit to enjoin remail operations as violative of 18 U.S.C. 1696, prohibiting private carriage of letters, would not "shar[e] common questions of law or fact with those at issue in this litigation." *Diamond*, 476 U.S. at 77. The issue in such a suit would be whether the defendants met the "cost" or "loss of value" test of the "extremely urgent letter" rule, which would permit them to carry letters out of the mails. The issue in this case is whether the remail suspension meets the public interest standard of PRA section 601(b).

<sup>8</sup> See Motion at 16 n.14.

<sup>9</sup> *City of Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77 (1958), relied on by ACCA for the proposition that an intervenor *can* have standing to defend a city ordinance (Br. at 10 n.6), is easily distinguished. There, the city petitioned for a writ of *certiorari*, which petition was granted before the Court considered the standing of Parmalee (an intervenor on the side of the defendant) to appeal. Further, Parmalee's threatened injury—total loss of its business to another company—was undisputed. Here, ACCA's members face no threat of injury from the failure to adopt the remail rule.

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September, 1990

No. 89-1816

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OCT 9 1990

JOSEPH F. SPANOL, JR.  
CLERK

**In the Supreme Court of the United States**  
**OCTOBER TERM, 1990**

**AIR COURIER CONFERENCE OF AMERICA, PETITIONER**

**v.**

**AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.**

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**REPLY BRIEF FOR THE  
UNITED STATES POSTAL SERVICE  
AS RESPONDENT SUPPORTING PETITIONER**

**JOHN G. ROBERTS, JR.**  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 89-1416

AIR COURIER CONFERENCE OF AMERICA, PETITIONER

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR THE  
UNITED STATES POSTAL SERVICE  
AS RESPONDENT SUPPORTING PETITIONER

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I. The D.C. Circuit held that since the unions are within the "zone of interests" of the Private Express Statutes (PES), 18 U.S.C. 1693-1699 and 39 U.S.C. 601-606, and the Postal Reorganization Act (PRA), 39 U.S.C. 101-5605, the unions can bring this action against the Postal Service under the Administrative Procedure Act, 5 U.S.C. 701, to challenge the suspension of the PES for international remailing. We argued in our opening brief that (A) the APA does not apply to the Postal Service; (B) the unions are not within the "zone of interests" of the PES, the "relevant statutes" for purposes of the APA; (C) the unions do not have an express or implied cause of action under the PES; and (D) the unions cannot prevail under the other laws cited in their complaint. Respondents challenge only our first three arguments.

A. We argued in our opening brief that Congress "preclude[d] judicial review" under the APA, 5 U.S.C. 701 (a) (1), by adopting 39 U.S.C. 410(a). Every court but one that has addressed that issue has agreed with our interpretation of that law.<sup>1</sup> We also argued (at 12-20) that the D.C. Circuit erred in ruling that the unions' interest in protecting the job opportunities of postal employees satisfies the "zone of interests" test. We showed that the PES is unconcerned with the job interests of postal employees, and that the court of appeals erred in looking beyond the PES to the PRA in conducting its "zone of interests" analysis. Fed. Br. 12-20.

1. The unions concede that Section 410(a) precludes review under the APA of some actions by the Postal Service, but they argue that a decision to suspend the PES is not among them. They contend that the word "including" means "a discrete or subordinate part or item of a larger aggregate [or] group," Resp. Br. 13 (quoting *Webster's Third International Dictionary of the English Language (Unabridged)* 1143 (1986) (*Webster's*)), and that Congress intended to exempt the Postal Service from review under the APA only in connection with those internal operations ("public or Federal contracts, property, works,

<sup>1</sup> See *Peoples Gas, Light & Coke Co. v. USPS*, 658 F.2d 1182, 1191 (7th Cir. 1981); *National Easter Seal Soc'y for Crippled Children & Adults v. USPS*, 656 F.2d 754, 767 (D.C. Cir. 1981); *Spinks v. USPS*, 621 F.2d 987, 989 (9th Cir. 1980); *Lutz v. USPS*, 538 F. Supp. 1129, 1133 (E.D.N.Y. 1982); *Caldwell v. Bolger*, 520 F. Supp. 626, 628 (E.D.N.C. 1981); *NAACP v. USPS*, 398 F. Supp. 562, 563 (N.D. Ga. 1975); *Burns v. USPS*, 380 F. Supp. 623, 626 (S.D.N.Y. 1974); see also *Jordan v. Bolger*, 522 F. Supp. 1197, 1201-1202 (N.D. Miss. 1981), aff'd summarily, 685 F.2d 1384 (5th Cir. 1982) (Table), cert. denied, 459 U.S. 1147 (1983). But see *National Retired Teachers Ass'n v. USPS*, 430 F. Supp. 141, 147 (D.D.C. 1977), rev'd on other grounds, 593 F.2d 1360 (D.C. Cir. 1979).

officers, employees, budgets, or funds") listed in the first clause of Section 410(a). Resp. Br. 12-18.<sup>2</sup>

Respondents have misread the term "including." The term "include" means "to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate[;] \* \* \* to take in, enfold, or comprise as a dis-

<sup>2</sup> Relying on an advisory opinion by the Postal Rate Commission (PRC), respondents suggest that the Postal Service has not consistently taken the position that it is exempt from the judicial review provisions of the APA. Resp. Br. 18-19 n.12. That claim is mistaken. The Postal Service and the PRC are different entities, compare 39 U.S.C. 201 (creating the Postal Service) with 39 U.S.C. 3601 (creating the PRC), and the PRC's views on this matter are not those of the Service. The PRC in its Order No. 133 also did not discuss the text of 39 U.S.C. 410(a) or 39 C.F.R. 310.7 in stating that review under the APA was available.

Respondents also contend that "the government has waived the defense that the APA is inapplicable" because we did not raise it in the lower courts. Resp. Br. 25. But the question whether the unions can obtain judicial review under the APA is not a "defense" to the unions' claims; it is a question of the authority of the courts to entertain the unions' challenge to the Postal Service's decision to suspend the operation of the PES. Respondents thus err in relying on *Jackson v. Seaboard C.L. R.R.*, 678 F.2d 992 (11th Cir. 1982), and *Powers v. Alabama Dep't of Educ.*, 854 F.2d 1285 (11th Cir.), cert. denied, 109 S. Ct. 3158 (1988), which held that a "seniority system" is a defense to a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, that must be pleaded at trial or else is waived. By contrast, *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), supports the conclusion that this question cannot be waived. *Block* not only held that consumers cannot obtain judicial review under the APA of milk marketing orders, but also declined to decide whether the plaintiffs had standing under Article III to bring suit. *Id.* at 353 n.4. If the preclusion issue was not "in effect jurisdictional," *ibid.*, the Court could not have avoided deciding the Article III issue. The unions do not attempt to distinguish *Block*, and none of this Court's other cases cited by the unions, Resp. Br. 26, involved preclusion of review. Lastly, the question whether the APA applies to the Postal Service is a logical antecedent to whether the unions satisfy the "zone of interests" test, since that test is "most usefully understood as a gloss on the meaning of [APA] § 702." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400-401 n.16 (1987).

crete or subordinate part or item of a larger aggregate, group, or principle \* \* \*." *Webster's* 1143. The principal clause in Section 410(a) exempts the Postal Service from federal laws "dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds," and thereby creates a "group, class, or aggregate" of laws that are inapplicable to the Postal Service. The subordinate clause then adds to the category established by the principal clause "the provisions of chapters 5 and 7 of title 5," rendering those laws as well inapplicable to the Service. Of course, Congress could have used the phrase "as well as" in Section 410(a), which would have made clearer its intent to exempt the Postal Service from the APA. But the question is not whether the text of that Section can be improved, but how it should be read. The most natural reading of its text exempts the Postal Service from the APA.

Respondents' reading of the subordinate clause assumes that its subject matter (*i.e.*, APA review) logically is a subset of its items listed in the principal clause (*i.e.*, contracts, property, etc.). But that is not true, since the APA provides a remedy and does not define substantive rules of law. Also, limiting APA preclusion to "contracts, property, and employees" assumes that the APA otherwise applies to those areas. In fact, "agency management or personnel or \* \* \* public property, loans, grants, benefits, or contracts" are specifically exempted from the rulemaking provisions of the APA. 5 U.S.C. 553(a)(2). The unions' interpretation of the APA preclusion in Section 410(a) ascribes to Congress the intent to exempt the Postal Service from laws that never applied to it under the APA in the first place.

Other provisions of the PRA buttress our interpretation of Section 410(a). For example, Section 410(b) lists exceptions to Section 410(a) (*i.e.*, federal laws as to which the Postal Service is subject), and includes the Freedom of Information Act, 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a, and the Government in the Sunshine Act, 5 U.S.C. 552b. 39 U.S.C. 410(b)(1). None of those laws

relates more closely than the APA to federal contracts, property, or employees, so there was no need for Congress to specify that those statutes apply to the Postal Service if the unions' reading of Section 410(a) were correct. Moreover, other provisions of the PRA specifically refer to the APA and require the Postal Service to follow APA procedures in certain instances. See 39 U.S.C. 3001(f) (proceedings concerning the mailability of matter are subject to Chapters 5 and 7 of Title 5), 3628 (decisions of the Postal Service Governors approving or modifying rate decisions of the Postal Rate Commission are subject to judicial review under the APA).<sup>3</sup> Those provisions would have been unnecessary if Congress had intended Section 410(a) to be given the cramped reading that the unions endorse. *National Easter Seal Soc'y for Crippled Children & Adults v. USPS*, 656 F.2d 754, 767 (D.C. Cir. 1981).

The unions argue that nothing in the legislative history of Section 410(a) supports our interpretation of that law. Resp. Br. 14-16. The most that can fairly be said about the legislative history of Section 410(a) is that it never specifically mentions the APA exemption,<sup>4</sup> and such silence hardly rises to the level of a "clearly expressed legislative intention \* \* \* contrary" to the text of Section 410(a). *CPSC v. GTE Sylvania, Inc.*,

<sup>3</sup> See also 39 U.S.C. 3603 (subjecting certain functions of the PRC to Chapters 5 and 7 of Title 5), 3661(c) (PRC proposals to change service having nationwide effect made subject to Sections 556 and 557 of Title 5).

<sup>4</sup> The Senate Report states that Section 410(a) exempts the Postal Service from "Federal laws dealing with contracts, property, the civil service system, the Budget and Accounting Act of 1921, apportionment of funds, and other laws which in most instances apply to Government agencies and functions." S. Rep. No. 912, 91st Cong., 2d Sess. 5 (1970). See also 116 Cong. Rec. 21,709 (1970) (Sen. McGee) (describing Section 410(a) as "relating to public works, contracts, employment, appropriations, budgeting, and any other laws governing agency operations"). A complete exemption from the APA easily fits within those characterizations.

447 U.S. 102, 108 (1980). In fact, "Congress' silence is just that—silence," *Alaksa Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987), and cannot impeach the text of that law. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 (1988) ("[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history").

Interpreting Section 410(a) as a blanket exception from the APA is also sensible. The PRA sought to transform the Postal Service into a quasi-private entity with the "status of a private commercial enterprise," *Loeffler v. Frank*, 486 U.S. 549, 556 (1988) (citation omitted), following "modern management and business practices," H.R. Rep. No. 1104, 91st Cong., 2d Sess. 2 (1970), in order to "launch[] 'the Postal Service into the commercial world,'" *Frank*, 486 U.S. at 556 (citation omitted); *Franchise Tax Board v. USPS*, 467 U.S. 512, 520 (1984). That goal would have been hampered by requiring the Postal Service to operate under the APA, like any other government agency, with respect to the myriad actions necessary to run a business. Congress sensibly made the APA applicable only in those circumstances where it found public participation and judicial review more important than efficiency, and it spelled out those instances expressly in the statute. See p. 5 & n.3, *supra*.

2. The unions contend that postal workers' interests in job security fall within the "zone of interests" of the PRA, Resp. Br. 27-40, but that argument is inconsistent with this Court's decision last Term in *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990). *Lujan* explained that to be adversely affected or aggrieved within the meaning of "a relevant statute" under APA § 702, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." 110 S. Ct. at 3186 (em-

phasis in original and added); *id.* at 3187 ("The relevant statute, of course, is the statute whose violation is the gravamen of the complaint."). Here, the "relevant statute[s]" are the PES, because it is the "public interest" element of 39 U.S.C. 601(b) that the Postal Service is alleged to have violated by suspending the PES for international remailing.

The unions ask the Court to ignore *Lujan* on the ground that the "zone of interests" discussion in that case is inconsistent with the Court's treatment of that issue in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987). Resp. Br. 29-30. Not so. While *Clarke* made clear that the phrase "a relevant statute" in APA § 702 should be read "broadly," 479 U.S. at 396, *Clarke* also explained that the inquiry must still refer to the statute that is the basis for the plaintiff's legal claim. *Id.* at 401 ("we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act"—the law forming the basis for the plaintiff's complaint in that case). By contrast, the unions would give the phrase "a relevant statute" an interpretation so expansive that it would effectively cease to have any meaning at all. The unions' position would allow the plaintiff to cite one law to show that it is "aggrieved" under APA § 702, and an unrelated law for its legal claim. Under that approach, any plaintiff who can satisfy Article III requirements can invoke the APA. That conclusion, however, is inconsistent with the Court's decisions, which have made clear that the APA does not authorize every party adversely affected by agency action to seek judicial review. *Clarke*, 479 U.S. at 397. As we explained in our opening brief (at 17, 20), the unions' position also would allow any postal employee whose job opportunities were threatened by any agency action to bring suit under the APA. The unions disclaim any such intent, but in the one footnote that the unions devote to their response they identify no prin-

ciple limiting a postal employee's ability to sue the Postal Service. Resp. Br. 40 n.30.

The unions clearly err in asserting that the legislative history of the PRA, on which the unions heavily rely, shows that the PES were "integral parts of the overall legislative enactment" that became the PRA. Resp. Br. 38. In fact, the opposite is true. When it passed the PRA, Congress did not make any substantive change to those portions of the PES codified in the Criminal Code, 18 U.S.C. 1693-1699; Congress readopted without change those portions of the PES codified in the Postal Code, 39 U.S.C. 601-606; and Congress required the Postal Service to conduct a two-year study and reevaluation of the PES before deciding whether those laws should be modified or repealed, PRA, Pub. L. No. 91-375, § 7, 84 Stat. 783; S. Rep. No. 912, 91st Cong., 2d Sess. 22 (1970); H.R. Rep. No. 1104, *supra*, at 48. In addition, none of the documents comprising the PRA legislative history suggests that the parties concerned with postal reform saw the PES as an integral part of that legislation. The messages from President Nixon to Congress endorsing postal reform made no mention of the PES. *E.g.*, Message from the President of the United States to the Congress, H.R. Doc. No. 313, 91st Cong., 2d Sess. (1970), *reprinted in* H.R. Rep. No. 1104, *supra*, at 51-56. The President's legislative proposal, the Postal Service Act of 1969, proposed to continue the PES without substantive change pending a two-year study by the Postal Service on their modernization. H.R. 11750, 91st Cong., 1st Sess. § 7 (1969), *reprinted in* *Postal Modernization: Hearings on Reorganization of the Postal Establishment to Provide for Efficient and Economical Postal Service Before the Senate Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 211-212 (1969). That provision was carried forward without discussion into subsequent versions of the legislation. The House and Senate Reports simply note that the proposed bills continue existing law without change and require the Postal Service to conduct that

study, H.R. Rep. No. 988, 91st Cong., 2d Sess. 7, 23, 41 (1970); H.R. Rep. No. 1104, *supra*, at 11, 44, 48; S. Rep. No. 912, *supra*, at 2, while the Conference Report contains no discussion of either the readoption of the PES or the proposed study, H.R. Conf. Rep. No. 1363, 91st Cong., 2d Sess. (1970).<sup>5</sup>

Accordingly, the unions' claim that "[t]he PES were reenacted only after Congress had given specific consideration to the need to maintain" a postal monopoly, Resp. Br. 38, is not borne out by the legislative history of the PRA upon which the unions rest their "zone of interests" argument. Perhaps the members of Congress gave this subject "specific consideration" once the Governors had presented their report on the PES to Congress. But that event took place in 1973, three years *after* the PRA became law. Board of Governors of the Postal Service, *Statutes Restricting Private Carriage of Mail and Their Administration*, H.R. Doc. No. 5, 93d Cong., 1st Sess. (Comm. Print 1973) [hereinafter *Report*].<sup>6</sup> There is no indication in the legislative history of the PRA that Congress gave any consideration to the PES contemporaneously with its consideration of the postal reforms that made up the PRA. Congress simply pre-

<sup>5</sup> The floor debate is also unhelpful to the unions. Representative Crane introduced as an amendment a bill to repeal the PES. The amendment was defeated after two other congressmen advocated waiting for the upcoming Postal Service study. 116 Cong. Rec. 20,473-20,479 (1970). These meagre comments do not support the conclusion that the House (to say nothing of the Senate or the President) considered the PES an integral part of the reform legislation.

<sup>6</sup> For the same reason, the unions' claim finds no support in the statement made by the Postal Rate Commission, in its Order No. 133, that "Congress concerned itself in detail with the Postal monopoly." Resp. Br. 38 n.27. That Order was issued in 1976 three years after the Governors' report had been transmitted to Congress (six years after the PRA was adopted), after Congress had held hearings on the subject, and after Congress decided to leave the PES unchanged.

served the status quo, perhaps to avoid diverting attention from and upsetting a compromise on revisions dealing with the principal topics of reform (increased control by management over postal operations and improved employer-employee relations). But there is no basis for the unions' argument that "[t]he PES were an integral part of that legislative package." Resp. Br. 39. On the contrary, the PES were deliberately placed on a back burner. The only relationship between the PES and the PRA is that some of the PES were readopted without substantive change on the same day that the PRA became law. That relationship cannot satisfy the "zone of interests" requirement under even the most generous reading of this Court's cases.<sup>7</sup>

B. Invoking 39 U.S.C. 409, which waives the sovereign immunity of the Postal Service, and 28 U.S.C. 1339,

<sup>7</sup> Neither *Clarke* nor any earlier case assists the unions. Those decisions allowed a plaintiff to challenge a determination by the Comptroller of the Currency permitting banks to engage in certain non-banking activities. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970), held that firms in the business of selling data processing services had standing to challenge a ruling by the Comptroller of the Currency that national banks, as an incident to their banking services, could offer data processing services to customers. *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), indicated that travel agencies would have standing to contest a determination by the Comptroller allowing banks to offer travel services. *Investment Company Inst. v. Camp*, 401 U.S. 617 (1971), held that investment companies had standing to seek judicial review of a decision by the Comptroller of the Currency authorizing banks to operate collective investment funds. And *Clarke* held that a trade association representing securities brokers had standing to bring suit alleging that the Comptroller exceeded his authority in approving the applications of two national banks to establish discount brokerage subsidiaries. Those decisions reflect a judgment that, in enacting the statutory framework governing the banking industry, Congress may well have been concerned, at least in part, with protecting non-bank businesses from competition by national banks. See, e.g., *Clarke*, 479 U.S. at 397. Nothing in the PES or their background, however, evinces a comparable concern with protecting the job interests of postal workers.

which grants federal courts jurisdiction over cases in which the Service is a party, the unions claim that even if Section 410(a) renders the APA inapplicable, they can obtain the identical judicial review of the international remail suspension in a so-called "common law" or "non-statutory" action for review. Resp. Br. 19-25.<sup>8</sup> The unions seek to bring what is known as an "officer's suit," i.e., an equitable action alleging that a government official has acted unconstitutionally or beyond his statutory authority, see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and to imply a cause of action against the Postal Service from the jurisdictional provisions cited above. We argued in our opening brief (at 21-23) that, given the APA, it is dubious that a court can ever imply a cause of action against the government. We also noted (at 10-11 n.5) that Congress eliminated the "officer's suit" theory in the 1976 amendments to the APA.<sup>9</sup> But even if "nonstatutory judicial review"

<sup>8</sup> That doctrine is a misnomer, since there are no "common law" forms of action in federal court; as Justice (then professor) Scalia once wrote: "All actions in federal courts are, strictly speaking, statutory." *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867, 870 n.12 (1970). This case illustrates why. If the unions could obtain the equivalent of APA review simply by relying on the statutes they cite, then Congress accomplished *nothing* by exempting the Postal Service from the APA, since a plaintiff can always invoke a "common law" right of review in order to obtain the same relief that the APA otherwise would afford. Laws should not be read in a manner rendering them meaningless, so the unions must identify a law expressly or impliedly granting them a cause of action to challenge the Postal Service's exercise of its suspension authority under 39 U.S.C. 601(b). The laws cited by the unions do not do so. The unions do not allege a constitutional violation, and cases implying such causes of action are not relevant here. E.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

<sup>9</sup> Congress designed the APA to serve as a single, uniform method for review of agency action, and implying causes of action can disrupt that scheme. Fed. Br. 23. Congress also eliminated

has survived to this day—and we think it has not—this case is not one in which such an action would lie.

The decisions of this Court cited by the unions upheld nonstatutory actions only when Congress impliedly authorized suit in the substantive law that a government officer was said to have violated. *Stark v. Wickard*, 321 U.S. 288 (1944), makes that point clearly. It held that milk producers could challenge the Secretary of Agriculture's milk marketing orders since Congress had impliedly authorized milk producers to bring suit under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601. As the Court explained, 321 U.S. at 304 (footnotes omitted):

It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity

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"officer's suits" and other forms of nonstatutory review in the 1976 amendments to the APA as an integral part of the compromise that added the waiver of the United States' sovereign immunity to APA § 702. See H.R. Rep. No. 1656, 94th Cong., 2d Sess. (1976); S. Rep. No. 996, 94th Cong., 2d Sess. (1976). The waiver of sovereign immunity in APA § 702 was subject to the other limitations of the Administrative Procedure Act, including the provisions rendering judicial review unavailable when a statute precludes review. See H.R. Rep. No. 1656, *supra*, at 27 (letter from Assistant Attorney General Scalia to Subcomm. Chairman Kennedy); S. Rep. No. 996, *supra*, at 26 (same). Under these circumstances, it would be unreasonable to imply from statutes such as 39 U.S.C. 409 and 28 U.S.C. 1339 the right to bring suit for injunctive relief that Congress has precluded under the APA. Cf. *United States v. Fausto*, 484 U.S. 439, 447-48 (1988) (the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified, as amended, at scattered sections of 5 U.S.C.), is the exclusive scheme for judicial review by federal employees of adverse personnel actions); *Block v. North Dakota*, 461 U.S. 273, 280-286 (1983) (Quiet Title Act of 1972, 28 U.S.C. 2409, is the exclusive means of challenging the United States' title to real property); *Brown v. GSA*, 425 U.S. 820 (1976) (Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, is the exclusive remedy for federal employment discrimination).

of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers.

The Court added that "[t]o reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies." *Id.* at 306. The other decisions of this Court cited by the unions are to the same effect.<sup>10</sup>

Those cases do not assist the unions. The unions limit their theory of "nonstatutory" judicial review to instances in which the Postal Service has "violated the substantive provisions of the PRA or its own regulations," or in which "postal regulations are *ultra vires*." Resp. Br. 19. The unions do not argue, however, that the Service's construction of the "public interest" standard in Section 601(b) violates one of its regulations or is *ultra vires*;

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<sup>10</sup> *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), was an "officer's" suit challenging under the Fourth and Fifth Amendments statutes that the Postal Service read as authorizing the Service to refuse to forward mail relating to a scheme to defraud. *Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407 (1921), was a mandamus action challenging the denial of second class mailing privileges. *Harmon v. Brucker*, 355 U.S. 579 (1958), permitted a suit to be brought to review the Army Review Board's decision to grant a less than honorable discharge. The Court saw the action as one involving a nondiscretionary duty, akin to a mandamus action, and in which a servicemember had a right to an honorable discharge if certain conditions were met. See *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958) (so characterizing *Harmon*). In *Leedom v. Kyne*, 358 U.S. 184 (1958), the Court, relying on *Magnetic Healing*, *Stark*, and *Harmon*, held that a party could bring suit against the National Labor Relations Board challenging a unit certification for collective bargaining purposes, because Section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. 159(b)(1), gave professional employees a right not to be certified under certain circumstances. *International Union, UAW v. Brock*, 477 U.S. 274 (1986), *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), and *Reilly v. Pinkus*, 338 U.S. 269 (1949), did not discuss this issue.

accordingly, their argument reduces to the claim that the Service's interpretation of Section 601(b) is simply wrong. As we have shown, Fed. Br. 13-16, 24-27, however, the PES do not impliedly confer on the unions (or anyone else) a cause of action to challenge the Service's suspension decisions, nor do the PES grant the unions (or anyone else) "an interest personal to [them] and not possessed by the people generally." *Stark*, 321 U.S. at 304. On the contrary, "public interest" determinations necessarily involve judgments made for the benefit of the public at large.

The unions claim that they can satisfy the test set forth in *Cort v. Ash*, 422 U.S. 66 (1975), for determining whether a private party can invoke an implied private right of action under federal law. In particular, the unions contend that they are among "the class for whose especial benefit the [PRA] was enacted." *Id.* at 78. See Resp. Br. 40-42. Here, too, the unions have focused on the wrong law. The PES are the pertinent statutes, because it is the Postal Service's suspension of the PES that has been challenged. But even if the unions could invoke the PRA, the relevant issues are "not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries," *California v. Sierra Club*, 451 U.S. 287, 294 (1981), and whether Congress intended that such rights would "be enforced through private litigation," *Universities Research Ass'n v.outu*, 450 U.S. 754, 771 (1981). The unions cannot make that showing.

II. In our opening brief we showed that the Postal Service carefully considered all of the relevant factors and reasonably explained why "the public interest require[d]" suspension of the PES for international remailing. 39 U.S.C. 601(a). See Fed. Br. 30-41. The unions challenge that decision on the ground that "the public ultimately must absorb, through higher postal rates, the net revenue loss to the Postal Service because of a

suspension designed to benefit only a relatively small number of firms who mail to international destinations." Resp. Br. 45.<sup>11</sup> The unions also claim that the Service did not consider the revenue loss from the suspension. Resp. Br. 46. Neither claim has merit.<sup>12</sup>

<sup>11</sup> The unions erroneously claim that the court of appeals agreed with their argument. Resp. Br. 42. The court of appeals held that the suspension was arbitrary because the Service considered *only* the benefits to businesses without *also* considering the effect of the suspension on rates and services. Pet. App. 14a. In fact, the court of appeals specifically rejected the unions' claim that the benefits to businesses cannot be considered. *Id.* at 15a ("We are unwilling to say that the USPS may not consider the benefits of a proposed suspension to businesses engaged in commerce abroad, including their enhanced competitiveness in the international arena.").

<sup>12</sup> In a footnote, the unions claim that the Postal Service did not adequately explain why it rejected more narrowly defined suspension alternatives. Resp. Br. 42 n.32. Neither the unions nor the court of appeals, Pet. App. 15a-16a, on which the unions rely, elaborated on that claim, and it lacks merit.

Although both the court of appeals and the unions refer to "several more narrowly defined suspension alternatives," Pet. App. 15a, neither the D.C. Circuit nor the unions explain what those alternatives were. In fact, the "alternatives" at issue were proposed drafts of the suspension that were distributed by the Postal Service at the May 22, 1986, public meeting that was held in order to elicit the views of interested parties about the appropriateness and practicality of the Postal Service's proposals. J.A. 121. See 2 C.A. App. 541-603 (transcript of meeting); *id.* at 604-608 (proposals). The Postal Service, however, did not receive any significant comments on those alternatives either at that meeting or later in the rulemaking process. Proposals 2, 3, and 4 were not materially different from the regulation ultimately adopted. Proposals 1 and 5 would have required monitoring of the mail in a foreign country. Significantly, neither of the respondent unions urged the Postal Service to adopt any of these five alternatives.

This case is similar to *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519 (1978). There, the Atomic Energy Commission's decision to license a nuclear power plant was challenged under the National Environmental Policy Act of 1969, 42

A. The unions' first argument proves too much. Any suspension must be defined and limited in some way or else the PES will be nullified. The "extremely urgent letter" suspension (which the unions appear to endorse) is limited by cost or urgency-in-fact requirements; the "re-mail suspension" is limited by destination. Any suspension also can be used by some parties more than others. The entire public can use the international re-mail suspension, but it is likely that firms and other institutional mailers will have more occasion than individuals to do so.<sup>13</sup> What is important, however, is not whether the public can use a particular suspension, but whether the suspension advances the "public interest." Here, the Postal Service determined that, by facilitating the sending of letters,

U.S.C. 4321, which specifically requires consideration of alternatives. In rejecting the argument that the Commission had not considered the alternative of energy conservation, the Court wrote: "[W]hile it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions. \* \* \* [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'" 435 U.S. at 553-554. Here, the unions had the opportunity to comment on these "alternatives" both at and after the public meeting, but failed to do so. Moreover, the unions still have failed to articulate any reasonable and viable alternative that would be substantially more restrictive than the present suspension. The Postal Service, having presented the proposals in an attempt to elicit comments, should not thereby be under a burden to justify its failure to adopt such proposals after no comments were received.

<sup>13</sup> During the rulemaking, entities ranging from large banks to small firms commented favorably on the practice of international remailing. The diverse character of those entities suggests that the benefits of the suspension may not be narrowly limited.

international remailing will enhance the ability of American firms to compete internationally, and the record compiled during the rulemaking proceedings amply supports that conclusion. Fed. Br. 31-33.

The Postal Service may consider that factor when determining whether the "public interest requires" a suspension of the PES. 39 U.S.C. 601(b). The Service must provide "prompt, reliable, and efficient services to patrons in all areas," 39 U.S.C. 101(a), and can enter into agreements for the international conveyance of mail, 39 U.S.C. 407. Due to the PES, the Service is the principal means by which letters are sent abroad. In suspending the PES for international remailing, the Service helped American firms send letters abroad in a manner that may enable them to become more competitive in foreign markets and prompt the Service to become more efficient. Those goals are in keeping with the statutory mission of the Postal Service. In sum, the international re-mail suspension clearly advanced the "public interest" even if only a small number of firms are the principal users.<sup>14</sup>

<sup>14</sup> This case is unlike *NAACP v. FPC*, 425 U.S. 662 (1976), which the unions invoke. Resp. Br. 43. That case held that the Federal Power Commission's duty to regulate in the "public interest" did not authorize it to prohibit discriminatory employment practices by its regulatees. The words "public interest" are "not a broad license to promote the general public welfare"; they "take meaning from the purposes of the regulatory legislation." 425 U.S. at 669. After surveying the relevant laws, the Court found that "[t]he use of the words 'public interests' in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates." *Id.* at 670. Here, the Postal Service did not suspend the PES in order to implement a policy wholly unrelated to its statutory mission. Rather, the Postal Service suspended the PES since it concluded that private carriers could provide a means of delivering letters internationally that was perceived as superior to the Service's own methods, that would benefit firms and the Service, and that would not prevent the Service from fulfilling its responsibilities. The "public interest" standard in Section 601(b) is sufficiently broad to cover such factors.

The unions also criticize the suspension on the ground that it will result in the loss of revenue to the Postal Service. Any suspension will inevitably result in the loss of some revenue, but Section 601 does not limit a suspension to instances in which the Service can turn a profit. By authorizing the Service to suspend the PES when "the public interest requires" that result, Congress concluded that the benefits of private mail carriage can outweigh the revenue loss resulting from a suspension of the Service's monopoly on the carriage of mail as well as the shifting of the burden caused by that loss. Thus, insofar as the unions' argument rests on the belief that no suspension can ever justify a revenue loss, that belief is inconsistent with the very existence of the Postal Service's suspension authority. And to the extent that the unions assume that the cost savings of international remailing were the sole reason for the suspension, the record shows that several factors persuaded the Service that a suspension was in the "public interest." 51 Fed. Reg. 29,636, 29,637 (1986) (Notice of Final Rule), *reprinted in* J.A. 102-103; Fed. Br. 32-33 & nn.14-17 (discussing the factors).<sup>15</sup>

In arguing that this suspension disserved the public interest, the unions rely heavily on a 1973 Report by the Board of Governors on the PES. Resp. Br. 43-44 (quoting *Report* 9). But the quoted passages were directed to the entirely different issue of whether the PES should generally be retained or modified, and not whether or how the PES should be suspended. In fact, the Gover-

<sup>15</sup> The unions attempt to make much of the fact that a remailer need not charge more than the Postal Service to carry letters under this suspension. Resp. Br. 44-45. But that has always been true of Express Mail in connection with the "extremely urgent letters" suspension. A \$3 per letter minimum rate must be charged to carry a letter of minimum weight in compliance with the "cost" test for "extremely urgent letters." 39 C.F.R. 320.6(c). That rate has always been less than the minimum postage rate of \$7.50 for the Express Mail's most widely used service in 1979, when this suspension was adopted. The comparable Express Mail rate today is \$8.75.

nors wrote that "[t]he restrictions of the [PES] should be suspended where there is a definite public need for delivery service that is substantially faster than any generally available service which the Postal Service now provides." *Report* 11. After evaluating the comments received by the Service in the lengthy rulemaking proceeding in light of its expertise, the Postal Service concluded that there was a need for international remailing that the Service could not then provide.<sup>16</sup> That rationale is consistent with the one stated in the Report for suspending the PES.<sup>17</sup>

B. Respondents' second argument—that the Postal Service did not consider the revenue loss from the suspension, Resp. Br. 46—adds nothing to the D.C. Circuit's reasoning, which we have already shown to be in error. As we explained in our opening brief (at 34-35), the Postal Service assumed that the total revenue loss from a suspension would equal the total revenue from international mail. Using that overinclusive (and therefore unduly bleak) standard, the Service determined that the revenue loss from the suspension was not so severe as to outweigh the benefits to the public interest from international remailing. That is precisely the type of

<sup>16</sup> The unions' only response is to say that remailers could have obtained the same service under the urgent letters exception. Resp. Br. 45. (In fact, during the rulemaking, several parties—including the Department of Justice, but not the Postal Service—expressed the view that remailing was already consistent with the terms of the urgent letter exception. J.A. 48, 66.) That argument misses the point. That exception is designed for an exceptional class of letters, not ordinary business correspondence. One could just as easily say that there is no need for any suspension because the sender can always lawfully make use of a private carrier if he pays postage to the Postal Service. 39 U.S.C. 601(a).

<sup>17</sup> The unions also quote a 1979 notice of proposed rulemaking in connection with "extremely urgent letter" suspension, Resp. Br. 44, but that passage is unhelpful. The notice merely expresses the view that cost savings *alone* are an insufficient ground for a suspension. Here, the Postal Service concluded that several factors in addition to cost savings justified the suspension.

judgment an agency is authorized to make when hard facts are unavailable. See *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (when the available data do not settle a regulatory issue, "the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-595 (1981) ("[T]he [FCC's] decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the [FCC's] ultimate conclusions is not required since a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.") (internal quotation marks omitted). The unions' argument ultimately reduces to the proposition that the Postal Service cannot act in the face of uncertainty, but this Court's decision in cases such as *WNCN Listeners Guild* are to the contrary and support the Postal Service's action in this case.

For the foregoing reasons and those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.  
Acting Solicitor General \*

OCTOBER 1990

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\* The Solicitor General is disqualified in this case.

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In The  
**Supreme Court of the United States**  
October Term, 1990

AIR COURIER CONFERENCE OF AMERICA,  
*Petitioner,*  
v.

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO, et al.,  
*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The District Of Columbia Circuit

PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

### I. INTRODUCTION

1. Respondent Unions circumvent their complaint's assertion of a violation of the PES, by asserting a violation of the PRA in their brief. The Unions apparently concede that postal employees were not within the zone of interests of any restriction on the private carriage of letters from 1792 to 1970. The Unions now insist that Congress' recodification of the civil provisions of the PES in the 1970 PRA gives them standing to challenge the International Remail Rule, because the PES suspension provision, 39 U.S.C. § 601, is now in the PRA; passage of the PRA involved "special solicitude" for postal employees; and that they, therefore, have standing because they are within the zone of interests of the PRA. The Unions' line of reasoning simply does not follow.

The Unions misapply *Clarke v. Securities Industry Association* by relying on the PRA to establish standing, because: (1) their complaint invokes a violation of the PES, not the PRA; (2) the PRA has no common purpose with the PES and is otherwise unhelpful in understanding Congress' overall purposes in the PES; and (3) whatever "special solicitude" was accorded postal employees in enacting the 1970 reforms that the Unions opposed, Congress did not then recognize any interest of postal employees in the enforcement of any restrictions on the private carriage of letters.

2. If APA standards do not apply, the Unions lack standing because the Unions have failed to demonstrate that the PES were enacted for the "especial benefit" of postal employees. Even if the PRA were relevant, the Unions' opposition to postal reform belies the notion that

its enactment was for their "especial benefit." The Unions' attempt to show a "special solicitude" towards postal employees during the legislative process of the PRA is factually flawed and legally insufficient to confer standing.

3. The Unions err in attempting to justify the Court of Appeals' substitution of its judgment for the Postal Service's on whether the International Remail Rule is in the public interest by arguing irrelevant case law, resorting to the 1973 Board of Governors' Report, and asserting a failure to discuss "cream-skimming." The Board's general comments about the PES in 1973 are irrelevant to whether the 1986 rulemaking record supports the rule. Cost-based pricing required by the PRA moots cream-skimming arguments, the Justice Department found those arguments unpersuasive, and the Postal Service overcame them by finding that potential revenue losses did not outweigh the public interest.

4. ACCA opposes the Postal Service's attempt to present the issue of the reviewability of Postal Service rules. The Postal Service did not raise this issue below and it is not fairly comprised within the questions presented by petitioner. The International Remail Rule is reviewable under the APA because (1) neither the 1970 PRA nor its legislative history demonstrate Congress' intent to repeal the APA's applicability to the Postal Service's exercise of purely governmental functions, and (2) the Postal Service's adoption of the APA by regulation affords APA remedies to the proper parties. In any event, Postal Service rules are reviewable under common law principles.

## II. DISCUSSION

### A. THE UNIONS HAVE NOT ESTABLISHED STANDING UNDER THE STATUTE ALLEGED TO HAVE BEEN VIOLATED

#### 1. The Unions Apparently Concede That They Are Not Within the Zone of Interests of the PES

The Unions' brief invokes the wrong statute to establish their standing to sue. The opening sentence of the Unions' complaint states:

1. *This is an action for declaratory and injunctive relief or in the alternative, for a writ of mandamus, to challenge the authority of the United States Postal Service ("USPS") to issue regulations suspending the operation of the Private Express Statutes ("PES"), 39 U.S.C. §§ 601-606, and 18 U.S.C. §§ 1693-1699, 1724, for the international remailing where it has not demonstrated that the public interest requires the suspension within the meaning of 39 U.S.C. § 601(b).*

*Id.* App. 107 (emphasis added). The charging paragraph of the complaint states in part:

WHEREFORE, plaintiffs respectfully request that this court provide the following relief:

(a) a declaratory judgment that *defendant's action promulgating 39 C.F.R. § 320.8 violated the PES[.]*

*Id.* at 111 (emphasis added). The complaint mentions the PES ten times. *Id.* at 107-111. It never mentions the PRA.

The Court recently explained in *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3186 (1990), that

to be adversely affected or aggrieved within the meaning of a statute, the plaintiff must establish that the injury he complains of . . . falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Notwithstanding the complaint's exclusive reliance on the PES and the clear indication of the PES's relevance in *Lujan*, the Unions' brief fails to discuss the zone of interests of the PES at all. In so doing, the Unions apparently concede that postal employees were never the intended beneficiaries of the restrictions on private carriage of mail and that they were not within the zone of interests of the PES at the times of their piecemeal enactment.<sup>1</sup>

The Unions now argue that the zone of interests test is "statute-specific," that "the inquiry concerns the entire statute," and suggest that they need only establish that they are "*within the PRA's overall zone of interests.*" Unions' Br. at 28-29 (emphasis added). The Unions have sought to establish their standing on the basis of the wrong statute.<sup>2</sup>

<sup>1</sup> The Unions err in dismissing the court reporter example in *Lujan* that clarifies the explanation of the zone of interests test in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), with the argument that it does "not overturn any aspect of *Clarke*." Unions' Br. at 30. ACCA does not contend that *Lujan* overruled *Clarke*, but that *Lujan* confirms that the Court of Appeals erred in relying on *Clarke* for its holding that the Unions have met the zone of interests test of standing.

<sup>2</sup> The Unions' attempt to shift the focus of the zone of interests inquiry from the PES to the PRA occurs in their misleading assertion that

*Lujan* is cited [by ACCA and the government] in support of their argument that, to demonstrate their standing, the Unions have the burden of showing that they are within the zone of interests protected by section 601 of the PRA – the section the Postal Service is alleged to have violated – and not within the PRA's overall zone of interests.

Unions' Br. at 29.

The Complaint alleges the violation of the entire PES, not simply § 601, which the Unions included in the broad definition of the

## 2. Partial Recodification Of The PES Does Not Establish The Relevance Of The Zone Of Interests Of The PRA

The Unions offer no satisfactory explanation of why the zone of interests of the PRA is relevant when they complain of a violation of the PES. They repeatedly return to the recodification of the civil provisions of the PES in the PRA. Hopscotching among various statutes and provisions, the Unions seem to argue that although they alleged a violation of the PES generally, they really rely on the PES suspension provision, § 601(b), for the alleged violation; that § 601(b) is now a PRA provision; and that, therefore, it is the legislative purpose of the PRA generally that determines their standing under the zone of interests test. That argument fails to meet the test of relevance established by this Court and indeed assumes that which the Unions must first establish.

To be relevant to the zone of interests of the PES, the PRA must (1) share an "identity of purpose"<sup>3</sup> or "single, unified purpose"<sup>4</sup> with the PES, see *Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150, 155 (1970), and (2) "help[ ] us understand Congress' overall purposes in" the PES. *Clarke v. Securities Industry Association*, 479 U.S. 388, 401 (1987).

PES, not in the PRA (as they now attempt to redefine it). Accordingly, ACCA contended that the zone of interests inquiry involved the historical restrictions on the private carriage of letters beginning in 1792, not simply § 601(b), discussion of which was limited to mere mention of its adoption in 1864. See ACCA Br. at 30 n.43.

<sup>3</sup> *Community Nutrition Institute v. Block*, 698 F.2d 1239, 1250 (D.C. Cir. 1983), reversed on other grounds, 467 U.S. 340 (1984).

<sup>4</sup> *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 141 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

The Unions attempt to meet the identity of purpose test by declaring that "the PRA is a single, unified statute which was enacted in its entirety at a single time." Unions' Br. at 39. The Unions confuse statutory form with legislative purpose. The Unions' assertion that the PRA is a "unified statute" begs the question of why the PRA is even relevant to the zone of interests of the PES. The Unions have not met the identity of purpose test.

The Unions have also failed to meet the second condition for consideration of the PRA: that it help explain Congress' overall purpose in enacting the PES. Indeed, the Unions never even attempt to tie any provision or legislative history of the PRA to any interpretation of Congress' purpose in the PES. Apparently recognizing that there is nothing in the PRA or its legislative history that is helpful in explaining the purpose of the PES, the Unions stay with the PRA only to conclude that the PES are "integral parts of the overall legislative enactment" of the PRA. Unions' Br. at 38. Even if that were true, it would be beside the point. Nothing in the Unions' lengthy discussion of the PRA is even remotely helpful to understand the purposes of the recodified civil code PES provisions now in the PRA, the criminal code provisions of the PES that were not recodified, or any reason for recodification that would implicate postal employees' interests.

In short, the "interplay" between the PES and PRA found by the Court of Appeals to give the Unions standing under the PES is a matter of form, not substance, and fails to meet this Court's two-pronged test of relevance of the PRA.

### 3. The Purported "Special Solitude" Accorded The Unions During Negotiations For Compromise Postal Reform Legislation Does Not Confer Standing

Having failed the "purpose" and "helpfulness" tests, nothing the Unions say about the enactment of the PRA is relevant to their standing to sue under the PES. It is nevertheless worth noting that the Unions have retreated from relying upon the benefits purportedly conferred on their members by the PRA to support the Court of Appeals' finding of an "interplay" between the PES and PRA, as the basis for standing. The Unions do not dispute ACCA's exposition of the legislative history demonstrating their opposition to the labor reforms and other provisions of the PRA on grounds that it would hurt postal employees and diminish their employment opportunities. ACCA Br. at 35. Having abandoned the refuted contention that the PRA benefited postal employees, the Unions now rely upon the "special solicitude" shown the Unions during the PRA's legislative process. Such "solicitude" is an even weaker basis than the purported benefits for the "interplay" between the statutes and therefore insufficient to confer standing under the zone of interests test.

Indeed, the Unions' support for that "solicitude" falls far short of establishing congressional intent of any kind. President Nixon's message about an agreement with postal unions hardly reflects Congress' intent. See Unions' Br. at 33-34. Nor can the Board of Governors' Report<sup>5</sup> issued two years after enactment of the PRA pass for legislative history of that Act. See Unions' Br. at 38.

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<sup>5</sup> United States Postal Service Board of Governors, *Statutes Restricting Private Carriage of Mail and Their Administration*, Com. Print No. 93-5, 93d Cong., 1st Sess. (1973).

Indeed, the Report fails to mention postal employees at all. The 1970 "wildcat" postal strikes are equally far-fetched as expressions of Congress' intent.<sup>6</sup> Putting all this extraneous material aside, all that remains are sweeping generalizations about the benefits of postal reform. They have nothing to do with restrictions on private carriage of letters or the suspension provision, let alone postal employees' interests in those provisions. Whatever it is, "special solicitude" does not establish the Unions' standing to enforce the PES or even the PES provisions now in the PRA.

#### **B. THE UNIONS LACK STANDING UNDER ANY NON-APA TEST BECAUSE THEY FAIL THE TEST OF STANDING FOR APA CASES**

It is unimportant to the determination of the standing question presented whether the APA applies or not, because the Unions cannot establish standing under any test for non-APA cases if, as demonstrated, they cannot meet the "generous" test of standing applying to APA cases articulated in *Clarke*. Given that the Unions have not even attempted to make a case that they are within the zone of interests of the PES independent of the PRA, it is clear that they cannot establish that the PES were enacted for postal employees' "especial benefit" under

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<sup>6</sup> The Unions' reliance upon the strike is particularly curious because the unauthorized strike weakened union leaders' ability to avert the joinder of the postal reorganization legislation they opposed with the pay increase legislation they favored. See generally, H. E. Dolenga, *An Analytical Case Study of the Policy Formation Process (Postal Reform and Reorganization)* 541-542, 550-551 (1973). Thus the strike and resulting compromise were a net loss for postal employees and reflect no solicitude toward them.

the test of standing in non-APA cases to which the Court alluded in footnote 16 of *Clarke*, citing *Cort v. Ash*, 422 U.S. 66 (1975).

However, as with their zone of interests argument, the Unions rely on the PRA for standing. Unions' Br. at 41-42. It is the PES they invoked to challenge the remail rule. The Unions' opposition to the PRA weighs even more heavily against a showing that the PRA was enacted for the "especial benefit" of postal employees, than against any inference that they are within the class Congress intended to enforce the restrictions on the private carriage of letters. The Unions err in equating the "special solicitude" they claim to have been accorded during the legislative process with a congressional intent to confer an "especial benefit" on postal employees. In any event, the *Cort v. Ash* test includes three other factors which the Unions have failed to address. While the Unions' inability to meet the especial benefit test obviates any need to resolve the three other factors, their failure to satisfy the other prongs dooms their claim of non-APA standing.

#### **C. THE UNIONS' FAILURE TO RAISE ANY LEGAL ISSUE CONCERNING THE PUBLIC INTEREST TEST CONFIRMS THE COURT OF APPEALS' IMPROPER SUBSTITUTION OF ITS JUDGMENT FOR THE POSTAL SERVICE'S**

Instead of identifying some legal infirmity in the Postal Service's interpretation of the public interest standard of § 601, the Unions argue (1) that the public interest standard has some limits; (2) that in 1973 the Board of Governors opposed repeal of the PES; and (3) that the Postal Service was concerned about "cream-skimming" in the 1979 urgent letter proceeding. We fail to see how any

of this helps the Unions establish the arbitrariness of the International Remail Rule.

First, the Court in *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 670-671 (1976), upon which the Unions rely (Unions' Br. at 43), held that the public interest standard of the Natural Gas and Federal Power Acts did not direct the Federal Power Commission to eradicate employment discrimination, absent some indication in the statutes or their legislative histories.<sup>7</sup> The Unions do not contend that any limits on the public interest standard set in *NAACP* have been exceeded here. That discrimination is not within the meaning of the public interest standard of the Natural Gas and Federal Power Acts is of no consequence to whether the Postal Service properly found the remail rule to be in the public interest under § 601(b).

Second, while *NAACP* directs attention to the statute and legislative history to determine whether discrimination was within the purposes of the regulatory legislation, the Unions point only to the general comments in the Board of Governors' 1973 Report. Unions' Br. at 43. These comments do not evidence Congress' intent or address the public interest test.

Third, the Unions' err in relying on the Postal Service's comments concerning "cream-skimming"<sup>8</sup> in considering the urgent letter rule, Unions' Br. at 44, to create

<sup>7</sup> Rather than offer the Unions any comfort on the merits, *NAACP*, if anything, detracts from their standing arguments. Without anything in the legislative history of § 601(b), the public interest standard cannot give rise to an interest in promoting postal employment any more than it gives rise to discrimination claims.

<sup>8</sup> "Cream-skimming" is an unfair pejorative description of a competitor eroding a monopolist's economic rents through competition, an essential and desirable feature of market economies.

any legal issue as to the application of the public interest standard in the remail rule proceeding. The PRA was intended to eliminate cross-subsidies between classes of service that make "cream-skimming" possible.<sup>9</sup> Moreover, the Department of Justice specifically addressed "cream-skimming" arguments in the remail rule proceeding and found them "unsound as a matter of economic policy." Jt. App. 36-37. Thus, the cream-skimming arguments<sup>10</sup> are inconsistent with the PRA, make no economic sense, and were considered and laid to rest when the Postal Service issued the remail rule after taking worst case revenue loss projections into consideration.<sup>11</sup>

#### D. THE INTERNATIONAL REMAIL RULE IS SUBJECT TO JUDICIAL REVIEW

The Postal Service supports ACCA on both questions presented. However, the Postal Service seeks to bypass

<sup>9</sup> See Moore, *The Federal Postal Monopoly: History, Rationale, and Future*, *Free the Mail* 65 (1990).

<sup>10</sup> It is debatable whether the "cream-skimming" theory ever had validity, given that historically it was the private expresses, not the Post Office, that opened frontier areas to mail service. This refutes the notion that cross-subsidies from postal services priced above competitive levels on which cream-skimming was possible were needed to establish and maintain service to distant, sparsely populated areas. The fact that today at least two private firms, Federal Express and United Parcel Service, provide delivery services to every address in the United States should lay the cream-skimming theory to rest once and for all.

<sup>11</sup> The Unions' argument that the "only real consequence of the remailing suspension was to release international remailers from the time and cost requirements of the urgent letter rule," Unions' Br. at 45, appears to acknowledge that the Postal Service's worst case estimate of revenue losses are unrealistically high.

those questions by presenting the argument that the International Remail Rule is not subject to judicial review at all.<sup>12</sup> ACCA opposes the Postal Service's attempt to raise the reviewability issue. ACCA respectfully requests that the Court adhere to its normal practice of refraining from addressing issues not raised in the court of appeals, see, e.g., *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986), or fairly included in the questions presented in the petition for writ of certiorari. See Supreme Court Rule 14.1.<sup>13</sup>

**1. PRA § 410(a) Did Not Repeal Application Of The APA To Postal Services Regulations Suspending The PES**

Both courts and all parties below assumed that the International Remail Rule was reviewable and that the APA provided the statutory framework for review. The Postal Service now argues that § 410(a) of the PRA precludes judicial review under the APA.

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<sup>12</sup> It is inconceivable that had the Postal Service issued a rule banning international remail, thereby imposing potential criminal penalties on remailers' activities, remailers would have been precluded from judicial review.

<sup>13</sup> The Postal Service argues that the reviewability issue has not been waived since it is "in effect jurisdictional," citing *Block v. Community Nutrition Institute*, 467 U.S. 340, 353 n.4 (1984). This argument is misplaced because it addresses the sufficiency of the Unions' complaint, not the lower courts' jurisdiction to hear the case. See 39 U.S.C. §§ 401, 409. Moreover, the Postal Service does not contend that its non-reviewability theory creates a "defect" that goes to this Court's jurisdiction pursuant to Supreme Court Rule 15.1. Finally, *Block v. Community Nutrition* does not appear to have involved waiver, but merely a reason for not reaching the issue of standing under the Agricultural Marketing Agreement.

Section 410(a) provides with certain exceptions, that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service." The Postal Service interprets § 410(a) as a wholesale exemption from the APA. USPS Br. at 10. The Unions believe that § 410(a) "deals only with laws governing *internal agency operations* . . . and the APA is inapplicable only with respect to administrative actions on those subjects." Unions' Br. at 16. ACCA submits that the Postal Service's interpretation is too broad and the Unions' may be too narrow.

The Postal Service and the Unions ignore three factors that undermine the Postal Service's blanket repeal interpretation: First, what is now PRA § 410(a) derived from § 2114 of former Title 39,<sup>14</sup> which did not exempt the Post Office from any part of the APA. Thus, prior to 1970, Post Office actions in general, and suspensions of the PES, in particular, were subject to judicial review under the APA.

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<sup>14</sup> Section 2114 of former Title 39 provided:

Sections 34 and 259 of title 40, and sections 12 and 14 of title 41, and any other provision of law, except applicable labor standards provisions, relating to the acquisition or disposal of real property, construction of buildings, or leasing of space, do not apply to any of the functions performed by the Postmaster General in effectuating the purposes of sections 2103-2116 of this title, except as provided by sections 2111 and 2112 of this title.

39 U.S.C. § 2114, Pub. L. 86-682, 74 Stat. 593 (Sept. 2, 1960).

Second, Congress in recodifying the PES in the PRA expressed an intent not to change the PES in any substantive way. See H.R. Rep. No. 1104, 91st Cong., 2d Sess. 44 (1970) ("H. Rep.") ("chapter [14 of the PRA] continues without substantive change the portion of the private express statutes found in existing chapter 9 of title 39").

Third, although the PRA's reorganization of the Postal Service was intended to permit the Service to operate in a more "business-like" manner and to become self-supporting,<sup>15</sup> Congress made clear that the Postal Service would remain "an independent establishment of the executive branch of the Government of the United States."<sup>16</sup> The Postal Service thus emerged from the PRA as an institutional hybrid: part private enterprise along the lines of a regulated industry with management freedom, but subject to rate regulation; part government agency with important policy-making and regulatory powers.

Accordingly, to be consistent with this statutory history and institutional framework, § 410(a) should be read to exempt the Postal Service from the APA in its management activities, but to continue the APA's applicability to its governmental functions. In administering the PES, the Postal Service acts in a policy-making and regulatory capacity quite far afield from day-to-day management considerations.<sup>17</sup>

<sup>15</sup> See H. Rep. at 5, 11-12, and 16-17; 39 U.S.C. § 3621 (authority to fix rates and classes); *Franchise Tax Bd. of Cal. v. Postal Service*, 467 U.S. 512, 519-20 (1984).

<sup>16</sup> 39 U.S.C. § 201; see also 39 U.S.C. § 409; *Franchise Tax Bd. of Cal.*, *supra* n.15.

<sup>17</sup> This view is supported by *National Retired Teachers Ass'n v. USPS*, 430 F. Supp. 141 (D.D.C. 1977), *aff'd*, 593 F.2d 1360 (D.C.

This Court has repeatedly acknowledged "the strong presumption that Congress intends judicial review of administrative action." *Traynor v. Turnage*, 108 S. Ct. 1372, 1378 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)). The presumption may be overcome "only upon a showing of clear and convincing evidence of a contrary legislative intent." *Traynor*, 108 S. Ct. at 1378 (citations omitted).

The legislative history of § 410 does not support a radical departure from pre-PRA law. Neither the House nor Senate Reports specifically mentions the APA. What little the reports say about § 410 is entirely consistent with the management versus governmental activities dividing line.<sup>18</sup>

Cir. 1979), in which the district court rejected the Postal Service's contention that § 410(a) completely exempted it from chapter 5 of the APA, reasoning:

[T]his contention is not supported by simple rules of grammar. According to the terms of § 410, in order to be exempt from chapter 5 of Title 5, a federal law must deal with public or Federal contracts, property, works, officers, employees, budgets or funds. See, e.g., *Chelsea Neighborhood Associations v. USPS*, 516 F.2d 378 (2d Cir. 1975). Inasmuch as § 553 does not, defendants' argument that the APA's notice and comment requirements do not apply to USPS is without merit.

430 F.Supp. at 147.

As the Unions point out, *National Easter Seal Society v. USPS*, 656 F.2d 754 (D.C. Cir. 1981), supports the Postal Service's position. However, that case did not involve the PES and was decided by the same court that applied the APA in this case. *Easter Seal* is therefore of dubious vitality.

<sup>18</sup> As noted by the Unions, see Unions' Br. at 15, the House Committee on Post Office and Civil Service characterized § 114 of the H.R. 17070, the cognate provision to § 410(a), as exclud[ing] the operation of Federal laws dealing

In short, there is no clear and convincing evidence that § 410(a) was intended to preclude judicial review of Postal Service suspensions of the PES under the APA.<sup>19</sup>

## 2. The APA Also Applies Under The Postal Service's Regulations

Even if § 410(a) were to exempt the Postal Service from the APA altogether, the Postal Service's non-reviewability argument should be rejected because the Service has by regulation agreed to abide by the APA when promulgating regulations under the PES.

The exemption from Federal laws granted by § 410(a) applies "except . . . insofar as such laws remain in force as

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with Federal contracts, property, works, officers, employees or funds, except as provided in the title or in the bylaws of the Postal Service.

H. Rep. at 26. The House provision was ultimately dropped in conference in favor of the Senate version of § 410. The Committee Report on S. 3842 described the Senate version of § 410 as follows:

The Board of Governors shall have broad authority and shall not, except as specified, be subject to Federal laws dealing with contracts, property, the civil service system, the Budget and Accounting Act of 1921, apportionment of funds, and other laws which in most instances apply to Government agencies and functions.

S. Rep. No. 912, 91st Cong., 2d Sess. 5 (1970).

<sup>19</sup> There is no indication that Congress had in mind the provisions of the PES as one of those ancient accretions of "legislative, budgetary, financial, and personnel policies that [were] outmoded, unnecessary, and inconsistent with . . . modern management and business practices," H. Rep. at 2, from which it wanted to exempt the Postal Service. Cf. *City of Rochester v. USPS*, 541 F.2d 967, 975 (2d Cir. 1976); *Chelsea Neighborhood Assocs. v. USPS*, 516 F.2d 378, 384 (2d Cir. 1975).

rules or regulations of the Postal Service." 39 U.S.C. § 410(a). The statute thus gives the Postal Service the power to continue in force laws which otherwise would not apply to it. Here, the Postal Service has by regulation continued the APA in force with respect to the Service's administration of the PES. Section 310.7 of 39 C.F.R. provides:

Amendments of the regulations in this part [Enforcement of the Private Express Statutes] and in Part 320 [Suspension of the Private Express Statutes] may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.

The "judicial review" provisions of APA chapter 7 are as essential to rulemaking as the "administrative procedures" of chapter 5. Undertaking to abide by APA procedures would be hollow indeed without concomitant judicial enforcement of those procedures.<sup>20</sup>

Section 310.7 must also be interpreted in light of (1) the Postal Service's recognition that the PES were historically administered through adjudication, (2) the Service's statement that rulemaking should be used in preference

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<sup>20</sup> When the new Postal Service issued comprehensive regulations under the PES in 1973, it noted that while a few formal regulations had been issued in the past, the PES were administered under an "essentially adjudicatory system" involving both administrative and judicial decisions. See *Proposed Comprehensive Standards for Permissible Private Carriage*, 38 Fed. Reg. 17,512 (July 2, 1973).

Comments on the proposed regulations expressed concern that they were unclear as to the Postal Service's commitment to follow the APA in making changes in the regulations. The Postal Service responded to these comments "through a blanket provision (§ 310.7) that all changes in the regulations will be made only consistently with the APA's rulemaking provisions." 39 Fed. Reg. 33,210.

to adjudication "where possible," and (3) the lack of any indication that regulations issued under the PES would not be subject to judicial review. Accordingly, the Court of Appeals correctly held that the Postal Service "has chosen to follow APA procedures when promulgating rules affecting the PES," and that "the APA provides the appropriate standards for evaluating the procedural and substantive issues in this case." Pet. App. 4a.

### 3. The International Remail Rule Is Reviewable Under Common Law Principles Of Administrative Law

The Postal Service argues that Postal employees do not have an implied private right of action under the PES. USPS Br. at 21-27. ACCA agrees, but notes that this argument begs the reviewability issue to which the Postal Service addresses it.

The question is whether the Unions can obtain judicial review of an agency action, not whether the Unions have an implied private right of action under the PES. The cases cited by the Postal Service have no application here, because they all involved private parties seeking to enforce federal statutes against *non*-federal persons in the manner of private attorneys general. The issue of whether a private party could obtain review of the action of a federal agency was not involved.<sup>21</sup>

<sup>21</sup> In *Cort v. Ash*, 422 U.S. 66 (1975), the question was whether a private cause of action for damages against corporate directors was to be implied in favor of a corporate stockholder under a criminal statute prohibiting corporations from making contributions to federal election campaigns. See 422 U.S. at 68. In *California v. Sierra Club*, 451 U.S. 287 (1981), the Sierra Club sought to establish a private right of action under the Rivers and

As the First Circuit made clear in the *Cousins* case,<sup>22</sup> also cited by the Postal Service, the labels "review of agency action" and "implied private right of action" are "reserve[d] for . . . entirely different situation[s]." 880 F.2d at 605. In the present case, the Unions are not asserting an implied private right of action. Therefore, the Postal Service's argument on this point is irrelevant.

Thus, ACCA agrees with the Unions that if judicial review is unavailable under the APA, it is nonetheless appropriate under common law principles that were firmly established even before the APA was enacted. The cases cited by both the Unions and the Postal Service attest to the continuing vitality of those common law principles because the APA was intended to broaden not preempt them. See Unions' Br. at 19-25; USPS Br. at 10 n.5.

Finally, the Postal Service ignores the provisions of 39 U.S.C. §§ 401 and 409, which waive sovereign immunity for the Postal Service and confer jurisdiction on the district courts in suits against the Postal Service.

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Harbors Appropriation Act of 1899 to enjoin California's construction of water diversion facilities for the California Water Project. See 451 U.S. at 289. Similarly, the question before the Court in *Karahalios v. Nat. Fed. of Federal Emp., Local 1263*, 109 S. Ct. 1282 (1989), was whether the Civil Service Reform Act of 1978 conferred on federal employees a private cause of action against a breach by a union representing federal employees of its statutory duty of fair representation. See 109 S. Ct. at 1284.

<sup>22</sup> *Cousins v. Secretary of DOT*, 880 F.2d 603 (1st Cir. 1989).

### III. CONCLUSION

For the reasons stated in petitioner ACCA's briefs, the Court should reverse the Court of Appeals' decision and reinstate the District Court's dismissal of the Unions' complaint.

Respectfully submitted,

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